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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1929

No. 344

CHARLES A. CORLISS, PETITIONER,

vs.

FRANK K. BOWERS, AS COLLECTOR OF INTERNAL REVENUE FOR THE SECOND DISTRICT OF NEW YORK

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 27, 1929

CERTIORARI GRANTED OCTOBER 21, 1929

(34,475)

(34,475)

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[fol. 1]

IN UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

L-39—354

CHARLES A. CORLISS, Plaintiff-Appellant,

against

FRANK K. BOWERS, as Collector of Internal Revenue for the Second District of New York, Defendant-Appellee

PRELIMINARY STATEMENT

This is an appeal taken by Charles A. Corliss, the plaintiff below, from a final judgment dismissing the complaint herein upon a motion made upon the pleadings by the defendant.

Plaintiff is represented by White & Case, of New York City. The defendant is represented by Charles H. Tuttle, Esq., United States Attorney.

The motion to dismiss was served on July 20, 1928. The motion was argued before Judge Mack on July 20, 1928 and an opinion was handed down on January 10, 1929, granting the motion.

The order granting the motion was entered on January 16, 1929 and the judgment appealed from was entered on January 21, 1929. The appeal was taken on February 6, 1929.

[fol. 2] IN UNITED STATES DISTRICT COURT, SOUTHERN NEW YORK

L 39/354

CHARLES A. CORLISS, Plaintiff,

against

FRANK K. BOWERS, as Collector of Internal Revenue for the Second District of New York, Defendant

ORDER APPEALED FROM

The defendant having moved to dismiss the complaint herein upon the ground that said complaint fails to state facts sufficient to constitute a cause of action, and said motion having duly come on to be heard before me,

Now, after hearing Samuel C. Coleman, Assistant United States Attorney, in support of the motion and Joseph M. Hartfield, of counsel for the plaintiff, in opposition thereto, and due deliberation having been had, and the Court having filed its opinion directing the dismissal of the complaint,

Now, upon motion of Charles H. Tuttle, United States Attorney, attorney for the defendant, it is

Ordered that said motion be and it hereby is granted, and the plaintiff having stated that it does not desire to serve an amendment to the complaint, that the complaint be [fol. 3] and it is hereby dismissed with costs and that the defendant have judgment accordingly.

Enter.

J. W. Mack, Circuit Judge.

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

CHARLES A. CORLISS, Plaintiff,

against

FRANK K. BOWERS, as Collector of Internal Revenue for the Second District of New York, Defendant

JUDGMENT

The defendant having moved for an order dismissing the complaint herein upon the ground that said complaint fails to state facts sufficient to constitute a cause of action and said motion by order of January 16, 1929 having been duly granted with directions accordingly,

Now, on motion of Charles H. Tuttle, United States Attorney, attorney for defendant, it is

Ordered, adjudged and decreed that the complaint herein be and it hereby is dismissed and that the defendant have

judgment against the plaintiff in the sum of $20.00, his costs as taxed.

Alex. Gilchrist, Jr., Clerk.

[fol. 4] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION TO DISMISS

Now comes the defendant and moves to dismiss the complaint herein upon the ground that said complaint fails to state the facts sufficient to constitute a cause of action.

Charles H. Tuttle, United States Attorney, Attorney for Defendant.

Dated New York, July 16, 1928.

[fol. 5] Summons, in usual form, omitted in printing.

[fol. 6] IN UNITED STATES DISTRICT COURT

COMPLAINT

The plaintiff, for his complaint herein, by White & Case, his attorneys, alleges:

1. That at all the times hereinafter mentioned the plaintiff was and now is a citizen of the United States of America, residing and having his principal place of business in the Second Internal Revenue District of the State of New York, in the Southern District of New York.

2. That at all the times hereinafter mentioned the defendant was and now is the Collector of United States Internal Revenue for the Second District of the State of New York.

3. That on or about December 29, 1922, the plaintiff, in the County and State of New York, assigned, transferred and delivered certain corporate stocks and bonds to Bank-

ers Trust Company, of the City of New York, as Trustee, under a trust indenture pursuant to which said Bankers Trust Company, as Trustee, was directed to pay the income therefrom currently in quarterly instalments to Anne Parrish Corliss, the wife of the plaintiff, for and during the term of her life and on her death to deliver the principal of the trust fund to certain persons other than the plaintiff. A copy of said trust indenture marked "Exhibit A," is attached hereto and made a part hereof. Said indenture at all the times herein mentioned constituted a bona fide, valid [fol. 7] trust under the laws of the State of New York.

4. During the year 1924, Bankers Trust Company, as Trustee of the trust referred to in the preceding paragraph, received the following gross income from the securities then constituting the principal of said trust:

Dividends on stock of domestic corporation	$123,521.25
Interest on 4 1/4% Liberty Loan Bonds, principal amount $57,000	2,415.15
Interest on obligations of States and political subdivisions thereof	1,725.31
Total	$127,661.71

and as such Trustee, sustained a loss on the sale of certain securities in said trust fund amounting to $302.

5. During the year 1924, Bankers Trust Company, as Trustee, disbursed the income of said trust referred to in the preceding paragraph as follows:

To Bankers Trust Company, as commissions for services rendered as Trustee	$3,190.82
For taxes	144.92
To Anne Parrish Corliss, as beneficiary of said trust	$124,325.97

6. On or about March 15, 1925, Bankers Trust Company, as Trustee of the trust referred to in the foregoing para- [fol. 8] graphs, filed with the defendant, Frank K. Bowers, as Collector, as aforesaid, a fiduciary return of income for said trust for the year 1924, in the form prescribed by the Regulation of the Treasury Department. A copy of said

fiduciary return of income, marked "Exhibit B," is attached hereto and made a part hereof.

7. None of the income referred to in paragraphs 4 and 5 above was paid or credited to, or received by the plaintiff during the year 1924 or any other year.

8. On or about the 15th day of March, 1925, the plaintiff duly filed with the defendant, Frank K. Bowers, as Collector, as aforesaid, a return for the purpose of determination and assessment of the income tax due from said plaintiff for the calendar year 1924, under and pursuant to the provisions of the Act of Congress approved June 2, 1924, known as the Revenue Act of 1924, and thereafter and on or about the 15th day of March, 1925, on or about the 15th day of June, 1925, on or about the 15th day of September, 1925, and on or about the 15th day of December, 1925, in quarterly instalments paid to the said Collector the sum of $31,945.30, being the amount of the income tax shown due in the said income tax return, and the amount of tax claimed by the plaintiff to be due and payable to the said Collector of Internal Revenue. A copy of the aforesaid income tax return, marked "Exhibit C," is attached hereto and made a part hereof.

9. The tax shown to be due in the return referred to in the preceding paragraph was computed without including [fol. 9] in taxable net income the amount of the income of said trust referred to in paragraphs 4 and 5 above. However, pursuant to Section 219 (g) of the Act of Congress approved June 2, 1924, and known as the Revenue Act of 1924, and the Regulations of the Treasury Department pertaining thereto, the amount of this income was reported in a rider attached to the return, which rider read as follows:

"This taxpayer is the grantor of a trust which, during all of 1924, was revocable. The income of such trust was payable to a beneficiary other than this taxpayer. The income of the trust in 1924 was as follows:

Dividends on stock of domestic corporations	$123,521.25
Other income	3,335.74
Loss on sale of securities by Trustee	302.00
Interest on 4 1/4% Liberty Loan Bonds, principal amount $57,000	2,415.15
Exempt interest on municipal and state bonds	1,725.31

The above income is reported herewith, pursuant to Section 219 (g) of the Revenue Act of 1924 and the Regulations of the Treasury Department. The tax payable on this return has been computed, however by this taxpayer without regard to such income, for the reason that this taxpayer believes and contends that the said provisions of the Revenue Act of 1924 and the Treasury Regulations taxing such income to this taxpayer are unconstitutional and void."

[fol. 10] 10. Thereafter, and on or about December 9, 1926 the Commissioner of Internal Revenue duly notified the plaintiff of the determination of a deficiency in income tax for the year 1924 in the amount of $44,910.88, and on or about February 11, 1927, notified the plaintiff that said deficiency had been recomputed and that the correct amount thereof was $44,687.43. Such deficiency resulted solely from including in the net income of the plaintiff for the year 1924, as the basis for computing the tax under Section 219 (g) of the Revenue Act of 1924, the income of the said trust as stated in paragraphs 4 and 5 hereof. A copy of said notice of deficiency, marked "Exhibit D," and a copy of said notice of the re-computation of said deficiency, marked "Exhibit DD," are attached hereto and made a part hereof. The plaintiff has filed no appeal with the Board of Tax Appeals from the determination of such deficiency, and more than sixty days have elapsed since the date upon which said notice of deficiency was mailed to the plaintiff.

11. Thereafter, the defendant, as Collector of United States Internal Revenue for the Second District of New York, demanded of plaintiff the sum of $44,687.43, together with interest in the amount of $4,115.83 as an additional income tax for the calendar year 1924, the said amount representing the deficiency in income tax determined by the Commissioner of Internal Revenue, as stated in the preceding paragraph.

12. Thereafter, and on March 11, 1927, in the forenoon, plaintiff, under duress, paid to defendant the amount of the additional tax and interest referred to in the preceding paragraph, less a credit of $464.94 representing an over-assessment for the year 1923, or a net amount [fol. 11] of $48,338.32.

13. Thereafter, and on March 11, 1927, in the afternoon, plaintiff duly appealed to the Commissioner of Internal Revenue by filing with the defendant a claim, a copy of which is attached hereto and marked "Exhibit E," for the refund of the net amount of the tax and interest paid as stated in the preceding paragraph, upon the ground that the provisions of the Revenue Act of 1924, and the Treasury Regulations pertaining thereto, which purport to tax plaintiff upon the income of the trust referred to in paragraph 3 above, are unconstitutional and void. Said claim for refund was thereafter and on or about the 23rd day of March, 1927, wholly rejected and denied by the Commissioner of Internal Revenue, as will appear from the communication received from the said Commissioner, a copy of which, marked "Exhibit F," is attached hereto and made a part hereof.

14. Plaintiff has at no time exercised in any manner any of the powers reserved in paragraph "Seventh" of the trust indenture referred to in paragraph 3 hereof.

15. Plaintiff alleges and claims that as said power of revocation was not exercised by plaintiff during the year 1924 or at any time prior thereto no tax upon the income of said trust for that year, as set forth in paragraphs 4 and 5 above, was due from plaintiff to the United States Government or to the defendant as Collector of United States Internal Revenue for the Second District of New York, and the sum of $48,338.32, being the amount of the [fol. 12] tax paid thereon, was illegally and without warrant or authority at law demanded and collected by the defendant from the plaintiff.

16 Plaintiff alleges and claims that the Act of Congress under which said sum of $48,338.32 was assessed against plaintiff and its payment compelled, to wit,—the Act of Congress approved June 2, 1924, and known as the "Revenue Act of 1924," is unconstitutional and void in so far as the same may be asserted to confer power to make said assessment against plaintiff and compel the payment thereof, for the reason that it violates the provisions of Article I, Section 2, Clause 3, of the Constitution of the United States to the effect that "direct taxes shall be apportioned among the several states," and the provisions of Article I, Sec-

tion 9, Clause 4 thereof, to the effect that "no capitation or other direct tax shall be laid unless in proportion to the census or enumeration hereinbefore directed to be taken," and the provisions of the fifth amendment to said Constitution, to the effect that no person shall be deprived of "property, without due process of law; nor shall private property be taken for public use, without just compensation." Plaintiff further alleges and claims that said Act as applied to plaintiff as aforesaid did not impose a tax on income, within the meaning of the provisions of the sixteenth amendment to the said Constitution, to the effect that "Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration"; and this plaintiff hereby draws in question the constitutionality of the said Act of [fol. 13] Congress and all provisions thereof assumed or asserted to authorize the assessment against and the collection from this plaintiff of said tax.

16. That no part of the said sum of $48,338.32 has been repaid to plaintiff and the whole amount thereof with interest thereon from the 11th day of March, 1927, remains due and owing from the defendant to this plaintiff, no assignment of this claim having been made.

17. This is a suit of a civil nature at common law, which arises under the Constitution and laws of the United States providing for internal revenue.

Wherefore plaintiff demands judgment against the defendant for the sum of Forty-eight Thousand Three Hundred Thirty-eight and 32/100 Dollars ($48,338.32) with interest thereon from the 11th day of March, 1927, together with the costs and disbursements of this action.

White & Case, Attorneys for Plaintiff. Office and Post Office address: 14 Wall Street, Borough of Manhattan, City of New York.

[fol. 14] *Duly sworn to by Joseph M. Hartfield. Jurat omitted in printing.*

[fol. 15] "EXHIBIT A" TO COMPLAINT

This indenture made the 29th day of December, 1922, between Charles A. Corliss, residing at Englewood, Bergen

County, New Jersey, party of the first part, and Bankers Trust Company, a corporation organized under the Banking Law of the State of New York, having its principle offices in the Borough of Manhattan, City and State of New York, hereinfater sometimes called the "Trustee," party of the second part.

Whereas, the party of the first part hereto desires to create a trust of the property and for the purposes hereinafter mentioned.

Now, therefore, this indenture witnesseth that in consideration of the premises, the mutual covenants herein contained, and of other good and valuable considerations, and of the sum of One Dollar ($1.00) to him in hand paid by the party of the second part, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, the party of the first part has granted, conveyed, assigned, set over and delivered, and by these presents does grant, convey, assign, set over and deliver unto said party of the second part, its successors and assigns, the property and securities described in Schedule "A" hereto annexed and made a part hereof.

Together with the appurtenances, and all the estate and rights of the party of the first part thereto.

To have and to hold all and singular the property and securities described in Schedule "A" hereto annexed, unto [fol. 16] said party of the second part, its successors and assigns, in trust, nevertheless, for and upon the following uses and purposes, and subject to the terms, conditions, powers and agreements hereinafter set forth.

First. To receive, hold, manage, sell, invest and reinvest the same and every part thereof, in the manner hereinafter specified, and to collect, recover and receive the rents, issues, interest, income and profits thereof, hereinafter called "Income," and after deducting the commissions of the Trustees as hereinafter provided, and the proper and necessary expenses in connection with the administration of the trust, to pay the same in quarterly instalments of equal amount, or as nearly equal as possible, unto Anne Parrish Corliss, wife of the party of the first part, for and during the term of her life.

Upon the death of said Anne Parrish Corliss, to convey, transfer and pay over the principal of the trust fund, in

equal shares, to the children of the party of the first part then living, and to the issue of any deceased children, the issue of any deceased children taking per stirpes and not per capita; with this proviso, however, that if any child or grandchild entitled to share in the remainder, as herein provided, shall not have attained his or her majority at the time of the death of Anne Parrish Corliss, wife of the party of the first part, then the share of the principal of the trust which otherwise would have been paid over to such beneficiary shall be continued in trust by the Trustee until the majority of the beneficiary, the income in the meantime being applied for the maintenance, education and support of the beneficiary, if necessary, and upon the benefi- [fol. 17] ciary attaining majority, to convey, transfer and pay over to him or her, as the case may be, the share of principal to which such beneficiary is entitled.

In the event that no children of the party of the first part, or issue of deceased children shall be living at the time of the death of Anne Parrish Corliss, wife of the party of the first part, then to convey, transfer and pay over the principal of this trust fund to such person, persons or corporations, and in such manner and proportions as said Anne Parrish Corliss shall in and by her duly executed and probated last will and testament designate and appoint.

Second. The Trustee is directed to retain, subject to the provisions hereof, any and all of the property and securities described in Schedule "A" hereto annexed in their present form, without liability for decrease in the value of such property or securities. During the life of the party of the first part no sales of property which may at any time comprise the trust fund, and no change in the investments of the trust fund, shall be made by the Trustee except on written directions from the party of the first part. The Trustee shall be fully protected in respect of any sales, investments and reinvestments as shall be directed by said party of the first part, and shall not be liable or responsible in any way for depreciation or loss incurred by reason of any such sales, investments or reinvestments.

In the event that the Trustee shall request from the party of the first part written instructions as to investments, and the party of the first part shall neglect or refuse to furnish such instructions for a period of thirty days, or in the [fol. 18] event that the party of the first part shall be un-

able for any reason to furnish such instructions, or in the further event that the party of the first part shall not then be living, the Trustee is hereby authorized and empowered to invest and reinvest the proceeds in such securities as it may deem suitable for the trust, and shall not be restricted to securities of the character authorized by the laws of the State of New York or the State of New Jersey for trust investments.

Subject to the above restrictions, the Trustee shall have full power to sell, lease, mortgage or exchange any real estate forming part of the trust fund, at such times and upon such terms and conditions as it may deem proper, and to make, execute and deliver good and sufficient deeds, leases, mortgages or other instruments affecting the same.

No purchaser upon any sale by the Trustee shall be bound to see to the application of the purchase money arising therefrom, or to inquire into the validity, expediency or propriety of any such sale.

Third. In any case in which the Trustee is required, pursuant to the provisions of this indenture, to divide the principal of the trust estate into parts or shares, or to distribute the same, it is authorized and empowered in its sole discretion to make such division or distribution in kind, or partly in kind and partly in money, and for the purpose of such allotment the judgment of the Trustee concerning the propriety thereof, and the relative value for the purpose of division or distribution of the property and securities so allotted, shall be binding and conclusive on all persons and corporations interested therein.

Fourth. The Trustee may in its sole discretion cause the securities which may from time to time, comprise the trust [fol. 19] fund, or any part thereof, to be registered in its name as Trustee hereunder, or in its own name, or in the name of its nominee, or to take and keep the same unregistered, and to retain them or any part thereof, in such condition that they will pass by delivery.

Fifth. Subject to the control and written directions of the party of the first part, the Trustee is authorized and empowered to vote in person or by proxy upon all stocks or other securities held by it; to exchange the securities of any corporation for other securities issued by the same, or by any other corporation, at such times and upon such terms

and conditions as the Trustee shall deem proper; to consent to the reorganization, consolidation or merger of any corporation, or to the sale or lease of its property, or any portion thereof, to any person or corporation of his or its property or any portion thereof, to such corporation, and upon such reorganization, consolidation, merger, sale or lease to exchange the securities held by it for the securities issued in connection therewith; to pay all assessments, subscriptions and other sums of money as the Trustee may deem expedient for the protection of its interests as holder of any stocks, bonds or other securities of any corporation, and to exercise any option contained in any stocks, bonds or other securities, for the conversion of the same into other securities, or take advantage of any rights to subscribe for additional stocks, bonds or other securities, and to make any and all necessary payments therefor, and generally to exercise in respect of all stocks, bonds or other investments held by the Trustee hereunder all rights, powers and privi- [fol. 20] leges as are or may be lawfully exercised by any person owning similar property in his own right.

Sixth. The Trustee shall be entitled to receive as compensation for its services in the administration of this trust a commission of 2½% upon income, and is hereby authorized to deduct such commissions before paying the income to the beneficiary or beneficiaries hereunder.

The Trustee also shall be entitled to a commission of 1% upon the market value of the principal of the trust fund, of which one-half shall be paid upon the execution of this indenture, and the balance when and as the trust shall terminate; said market value to be computed as of the date of this indenture as regards property and securities comprising the original trust fund.

The Trustee is also authorized in the discharge of its duties to employ counsel and agents and to determine and pay to them reasonable compensation, and it shall be entitled to reimbursement for the same, and for such other expenses and charges as it may deem necessary and proper to incur.

Seventh. Nothwithstanding anything to the contrary herein contained, the party of the first part may, from time to time, during the continuance of the trust, by instrument

in writing executed and acknowledged in the manner required for a deed of real property so as to enable it to be recorded in the State of New York and delivered to the Trustee, modify or alter in any manner, or revoke in whole or in part, this indenture and the trusts then existing, and the estates and interests in property hereby created, and in case of such revocation said instrument shall direct the [fol. 21] disposition to be made of the trust fund, or of the portion thereof affected by such revocation, and the Trustee shall make, execute and deliver such instruments, if any, and make such conveyances and transfers of property as may be necessary or proper in order to carry the same into effect, and no one shall have any right, interest or estate under this indenture except subject to the proper modification, alteration or revocation thereof.

Eighth. The party of the first part covenants and agrees to make, execute and deliver in due form of law such other and further assignments, conveyances or other instruments as the Trustee may deem requisite or necessary to effectuate the purposes hereof.

Ninth. The Trustee is further authorized and empowered to pay any and all taxes which properly may become payable from time to time, under the laws of the United States, or of any state, county or municipality on said trust property, or for any transfer thereof or transaction affecting the same, and to affix and cancel tax stamps in accordance with the provisions of said laws.

Tenth. The Trustee by joining in the execution of this instrument signifies its acceptance of the trust.

Eleventh. It is mutually agreed that these presents shall extend to and be obligatory upon the executors, administrators, legal representatives and successors, respectively, of the parties hereto.

This instrument is made in duplicate, each of which is an original, but both together shall be deemed one and the [fol. 22] same instrument.

In witness whereof the party of the first part has hereunto set his hand and seal, and the party of the second part has caused these presents to be signed by a Vice-President and its corporate seal to be hereunto affixed and attested

by an Assistant Trust Officer as of the day and year first above written.

Charles A. Corliss. (Seal.) Signed, sealed and delivered in the presence of Horatio R. Reed. Bankers Trust Company, by H. F. Wilson, Jr., Vice-President. Attest: P. E. Godridge, Assistant Trust Officer. (Seal.)

STATE OF NEW YORK,
County of New York, ss:

On this 3rd day of January, 1923, before me came Charles A. Corliss, to me known to be the individual described in and who executed the foregoing instrument, and acknowledged that he executed the same.

John Nicholas, Notary Public, Queen's County, No. 3102. New York Co. Clerk's No. 158, Register No. 4112. Commission expires March 30, 1924.

[fol. 23] STATE OF NEW YORK,
County of New York, ss:

On this 3rd day of January, 1923, before me personally came H. F. Wilson, Jr., to me known, who being by me duly sworn, did depose and say that he resides at Upper Montclair, N. J.; that he is a Vice-President of Bankers Trust Company, the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument in such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

John Nicholas, Notary Public, Queen's County, No. 3102. New York Co. Clerk's No. 158, Register No. 4112. Commission expires March 30, 1924.

[fol. 24] SCHEDULE "A"

$10,000 American Power & Light Deb. 6s.
$10,000 Poole Engineering Co. 6s.
$5,000 Minneapolis & St. Louis R. R. 1st Cons. 5%.

"EXHIBIT B" TO COMPLAINT

Form 1041
U. S. Internal Revenue

(Auditor's Stamp)

FIDUCIARY RETURN OF INCOME
For Calendar Year 1924

Do Not Write in These Spaces

File
Code

Serial
Number

Examined

By

Date Received

Or for period begun ....., 1923, and ended , 1924

File This Return Not Later Than the 15th Day of the Third Month Following the Close of the Taxable Year
(PRINT PLAINLY AND ADDRESS PLAINLY BELOW.)

Name of Estate or Trust: CHARLES A. CORLIES

Name and Address of Fiduciary:
Bankers Trust Company
16 Wall Street
New York City.

1. Was a return of income for 1923 filed on behalf of the estate or trust named above?		
2. If so, to what collector's office was it sent (give district or city and State)?		
3. Give date of creation of trust or decedent's death 12/28/22		
INCOME		
1. Income from Trade or Business. (From Schedule A)		
2. Interest on Bank Deposits, Notes, Mortgages, and Corporation Bonds		
3. Income from Partnerships, Fiduciaries, etc. (From Schedule B)		
4. Rents and Royalties. (From Schedule C)		
5. Profits from Sale of Real Estate, Stocks, Bonds, etc. (From Schedule D)	302	00
	123,521	25

"EXHIBIT B" TO COMPLAINT

Form 1041
U. S. Internal Revenue

FIDUCIARY RETURN OF INCOME
For Calendar Year 1924

Do Not Write in These Spaces

File No.
Code
Serial Number
Examined
By
Date Received

Or for period begun ..... 1923, and ended .1924

File This Return Not Later Than the 15th Day of the Third Month Following the Close of the Taxable Year
(PRINT NAMES AND ADDRESS PLAINLY BELOW)

Name of Estate or Trust: CHARLES A. CORLIES

Name and Address of Fiduciary: Bankers Trust Company, 16 Wall Street, New York City.

1. Was a return of income for 1923 filed on behalf of the estate or trust named above?			
2. If so, to what collector's office was it sent (give district or city and State)?			
3. Give date of creation of trust or decedent's death	12/28/22		
INCOME			
1. Income from Trade or Business. (From Schedule A)			
2. Interest on Bank Deposits, Notes, Mortgages, and Corporation Bonds			
3. Income from Partnerships, Other Estates, etc. (From return of fiduciary of partnership, etc.)			
4. Rents and Royalties. (From Schedule B)			
5. Profits from Sale of Real Estate, Stocks, Bonds, etc. (From Schedule C)	302	00	
6. Dividends on Stock of Domestic Corporations	123,521	25	
7. Other Income (including dividends received on stock of foreign corporations). (Show nature of income)			
(a)			
(b)			
(c)			123,219 25
Total Income as from 1 to 7			
DEDUCTIONS			
8. Interest Paid			
10. Taxes Paid	134	92	
11. Losses by Fire, Storm, etc. (Explain in note on page)			
12. Bad Debts. (Explain in Schedule D)			
13. Contributions. (Explain in Schedule E)			
14. Other Deductions Authorized by Law. (Explain in Schedule D)	3,190	82	
15. Total Deductions as from 9 to 14			3,353 74
16. Net Income (Item 8 minus Item 15)			

17.

BENEFICIARIES' SHARES OF INCOME AND CREDITS
(See Instruction 10)

1. Name and Address of Each Beneficiary (If Corporation, Give Principal Office)	2. Per-centage of Each Interest	Income (Item 6 above) 3. Attributable to 1923	4. Attributable to 1924	Balance of Net Income (Item 16 minus Item 6) 5. Attributable to 1923	6. Attributable to 1924	Capital Net Gain or Loss (Schedule D, minus 6) 7. Attributable to 1923	8. Attributable to 1924	9. Income Tax Paid or Payable on Net Gain Shown in Item 8	10. Income and Profits Taxes Paid or Payable to Foreign Countries and United States Possessions
(a) Anne P. Corlies			123,521 25		3333 74				
(b)									
(c)									
(d)									
(e)									
(f) Name and address of Grantor Charles A. Corlies									
(g)									
(h)									
(i) Totals									

NONTAXABLE OBLIGATIONS OR SECURITIES

1. Description of Securities	2. Amount Owned	3. Interest Received
(a) Obligations of a State, Territory, or any political subdivision thereof, or the District of Columbia	53,000	1725 31
(b) Securities issued under the provisions of the Federal Farm Loan Act, or under such Act as amended		
(c) Liberty 3½% Bonds and other obligations of United States issued before Sept. 1, 1917, and obligations of United States possessions		
(d) Liberty 4% and 4½% Bonds and other obligations of the United States issued after September 1, 1917	57,000	2435 35

SCHEDULE A INCOME FROM TRADE OR BUSINESS (See Instruction 3)

1. Total receipts from trade or business (state kind of business) _____ $ _____

Cost of Goods Sold

2. Labor _____ $ _____
3. Material and supplies _____
4. Merchandise bought for sale _____
5. Other costs (Itemize below or on separate sheet) _____
6. Plus Inventory at beginning of year _____
7. Total (Lines 2 to 6, inclusive) _____ $ _____
8. Less inventory at end of year _____
9. Net Cost of Goods Sold (Line 7 minus Line 8) _____ $ _____

Other Business Deductions

10. Salaries, exclusive of "Labor," reported on Line 2 _____ $ _____
11. Interest on business indebtedness to others _____
12. Taxes on business and business property _____
13. Losses by fire, storm, etc. (explain in table provided therefor at foot of page) _____
14. Bad debts arising from sales _____
15. Depreciation, obsolescence, and depletion (explain in table provided therefor at foot of page) _____
16. Rent, repairs, and other expenses (Itemized below or on separate sheet) _____
17. Total (Lines 10 to 16, inclusive) _____ $ _____

18. Total Deductions (Line 9 plus Line 17) _____ $ _____
19. Net Income (Line 1 minus Line 18) (Enter as Item 1) _____ $ _____

Explanation of deductions claimed on Lines 8 and 14 _____

SCHEDULE B—INCOME FROM RENTS AND ROYALTIES (See Instruction 4)

1. Kind of Property	2. Amount Received	3. Cost	4. Value as of March 1, 1913	5. Depreciation (Explain in table at foot of page)	6. Repairs	7. Other Expenses (Itemize below)	8. Net Income (Enter as Item 4)
	$	$	$	$	$	$	$

Explanation of deductions claimed in Column 7

SCHEDULE C—PROFIT FROM SALE OF REAL ESTATE, STOCKS, BONDS, ETC. (See Instruction 5)

1. Kind of Property	2. Date Acquired	3. Amount Received	4. Depreciation Previously Allowed	5. Cost	6. Value as of March 1, 1913	7. Depreciation Subsequent	8. Net Profit (Enter as Item 5)
Stocks	1923	26,698 00	$	27,000 00	$	$	$ 302 00
		Sales of securities belonging to the principal of this trust have resulted either in a net loss or in a profit of less than $1,000. No part of the proceeds of any sale was distributable to the beneficiaries of the trust.					

State how property was acquired _____

SCHEDULE D—CAPITAL NET GAIN OR LOSS FROM SALE OF ASSETS HELD MORE THAN TWO YEARS (See Instruction 5a)

1. Kind of Property	2. Date Acquired (Mo. Day Year)	3. Date Sold (Mo. Day Year)	4. Amount Received	5. Depreciation Previously Allowed	6. Cost	7. Value as of March 1, 1913	8. Subsequent Improvements and Capital Expenditures	9. Net (Excess of Item 4 or Item 5 over Item 8)
			$	$	$	$	$	$

State how property was acquired _____

EXPLANATION OF DEDUCTION FOR LOSSES BY FIRE, STORM, ETC., CLAIMED IN SCHEDULE A AND IN ITEM 11

1. Kind of Property	2. Date Acquired	3. Cost	4. Value as of March 1, 1913	5. Subsequent Improvements	6. Depreciation Previously Allowed	7. Insurance and Salvage Value	8. Net Loss (Enter as Item 11)
		$	$	$	$	$	$

EXPLANATION OF DEDUCTION FOR DEPRECIATION CLAIMED IN SCHEDULES A AND B

1. Kind of Property (If building, state material of which constructed)	2. Date Acquired	3. Age When Acquired	4. Probable Life After Acquisition	5. Cost	6. Value as of March 1, 1913	Amount of Depreciation Claimed: 7. For this year	8. This year
				$	$	$	$

SCHEDULE E—EXPLANATION OF DEDUCTIONS CLAIMED IN ITEMS 12, 13, AND 14

_____

_____

_____

AFFIDAVIT

I swear (or affirm) that this return, including the accompanying schedules and statements (if any), has been examined by me, and, to the best of my knowledge and belief, is a true and complete return made in good faith for the accounting period as stated, pursuant to the Revenue Act of 1926 and the Regulations issued under that authority thereof.

Sworn to and subscribed before me this _____ day of _____, 192_

_____
(Signature of fiduciary or officer if corporation)

_____
(Title of officer, if corporation)

An amended return must be plainly marked "Amended" across face of return.

"EXHIBIT C" TO COMPLAINT

Form 1040
U. S. Internal Revenue

INDIVIDUAL INCOME TAX RETURN

FOR NET INCOMES OF MORE THAN $5,000
OR NET INCOMES, REGARDLESS OF AMOUNT, IF DERIVED FROM A PROFESSION OR BUSINESS, INCLUDING FARMING

For Calendar Year 1924

If Your Income is Computed on a Fiscal Year Basis, or Income is Received from a Partnership or Fiduciary Computed on a Fiscal Year Basis, Form 1065FY Should be Secured from the Collector and Filed in Lieu of This Form

File This Return with the Collector of Internal Revenue for Your District on or Before March 15, 1925
(PRINT NAME AND ADDRESS PLAINLY BELOW)

Charles A. Corliss
(Name)
131 Hudson St.
(Street and number, or rural route)
New York City
(Post office) (State)

Do Not Write in These Spaces

File No.
Code
Serial Number
First Payment
$
Examined
By
(Collector's Stamp)
Cash Check M. O. Cert. of Ind

OCCUPATION, PROFESSION, OR KIND OF BUSINESS: President of Lamont, Corliss & Co.

1. Are you a citizen or resident of the United States? Yes
2. If you filed a return for 1923, to what Collector's office was it sent? Second Dist., N.Y.
3. Is this a joint return of husband and wife? No
4. Were you married and living with husband or wife on the last day of your taxable year? Yes
5. If not, were you on the last day of your taxable year supporting one or more persons living in your household who are closely related to you by blood, marriage, or adoption?
6. If your status in respect to questions 4 and 5 changed during year, state date of such change: No change
7. How many dependent persons (other than husband or wife) under 18 years of age or incapable of self-support because mentally or physically defective were receiving their chief support from you on the last day of your taxable year? None

Item and Schedule No.	INCOME	Amount received	Deductions not allowed		
1.	Salaries, Wages, Commissions, etc. (State name and address of persons from whom received) Lamont, Corliss & Co. 131 Hudson St., N.Y.C.			56,500	00
	Director's fees from various corporations			3,520	00
2.	Income from Business or Profession. (From Schedule A)				
3.	Interest on Bank Deposits, Corporation Bonds, etc. (except interest upon which a tax was paid at source)			2,784	66
	(a) Interest on Tax-free Covenant Bonds Upon Which a Tax was Paid at Source			60	00
4.	Income from Partnerships, Fiduciaries, etc. (State name and address of partnership, etc.)				
5.	Rents and Royalties. (From Schedule B)				
6.	Profit from Sale of Real Estate, Stocks, Bonds, etc. (From Schedule C)			21,381	75
7.	Dividends on Stock of Domestic Corporations			53,483	67
8.	Taxable Interest on Liberty Bonds, etc. (From Schedule D)				
9.	Other Income (including dividends received on stock of foreign corporations). (State source of income)				
	(a) Dividends on stock of foreign corporations			1,664	22
	(b) Final liquidating dividend on stock - reported as closed transaction in 1922 at time of receipt of what was then believed to be final dividend.			755	57
	(c)				
10.	Total Income as Items 1 to 9				140,089 67
	DEDUCTIONS				
11.	Interest Paid			3,979	98
12.	Taxes Paid. (Explain in Schedule F)			1,345	26
13.	Losses by Fire, Storm, etc. (Explain in Table on page 2)				
14.	Bad Debts. (Explain in Schedule F)				
15.	Contributions. (Explain in Schedule F)			2,999	99
16.	Other Deductions Authorized by Law. (Explain below or on separate sheet)				
	(a)				
	(b)				
	(c)				
17.	Total Deductions as Items 11 to 16				8,324 63
18.	Net Income (Item 10 minus Item 17)				131,765 24

COMPUTATION OF TAX

19.	Earned Income (see Instruction 19)	10000	00	20. Net Income (Item 18 above)	131765 24	41. Normal Tax (1% of Item 37)	80 00
21.	Less Personal Exemption and Credit for Dependents	8500	00	21. Less Dividends (Item 7 above)	53483 67	42. Normal Tax (4% of Item 38)	160 00
22.	Balance (Item 19 minus 21)	1500	00	22. Interest on Liberty Bonds, etc. (Item 8)		43. Normal Tax (8% of Item 40)	4066 88
23.	Amount taxable at 2% (not over the first $4,000 of Item 22)	4000	00	23. Personal Exemption	2500 00	44. Surtax on Item 18 (see Instruction 20)	28773 14
24.	Amount taxable at 4% (not over the second $4,000 of Item 22)	3500	00	24. Credit for Dependents		45. Adjustment for Capital Gain or Loss (12½% of Column 9, Schedule D)	1078 53
25.	Amount taxable at 6% (balance over $8,000 of Item 22)			25. Total of Items 21, 22, 23, and 24	55983 67	46. Total of Items 41 to 45	32001 50
26.	Normal Tax (2% of Item 22)	80	00	26. Balance (Item 20 minus 25)	75781 57	47. Less Credit of 25% of Tax on Earned Net Income (Item 29)	55 00
27.	Normal Tax (4% of Item 23)	140	00	27. Amount taxable at 2% (not over the first $4,000 of Item 26)	4000 00	48. Total Tax (Item 46 minus 47)	31946 50
28.	Normal Tax (6% of Item 24)			28. Balance (Item 26 minus 27)	71781 57	49. Less Income Tax paid at source	1 20
29.	Normal Tax on Earned Net Income (total of Items 26, 28, and 27)	220	00	29. Amount taxable at 4% (not over the second $4,000 of Item 26)	4000 00	50. Income and Profits Taxes paid to foreign country or U. S. possession	
30.	Credit of 25% of Item 29 (not to exceed 25% of Items 41, 42, and 43)	55	00	30. Amount taxable at 6% (balance over $8,000 of Item 26)	67781 57	51. Balance of Tax (Item 48 minus Items 49 and 50)	31945 30

An amended return must be marked "Amended" at top of return. Checks and drafts will be accepted only if payable at par

SCHEDULE A--INCOME FROM BUSINESS OR PROFESSION (See Instruction 7)

1. Total

2. Labor
3. Mater
4. Manuf
5. Other
6. Plus t
7.
8. Less i
9. Net i

This taxpayer is the grantor of a trust which, during all of 1924, was revocable. The income of such trust was payable to a beneficiary other than this taxpayer. The income of the trust in 1924 was as follows:

Dividends on stock of domestic corporations	$123,521.25
Other income	3,335.74
Loss on sale of securities by Trustee	302.00
Interest on 4 1/4% Liberty Loan bonds, principal amount $57,000	2,415.15
Exempt interest on municipal and state bonds	1,725.31

The above income is reported herewith, pursuant to Section 219 (g) of the Revenue Act of 1924 and the Regulations of the Treasury Department. The tax payable on this return has been computed, however, by this taxpayer without regard to such income, for the reason that this taxpayer believes and contends that the said provisions of the Revenue Act of 1924 and the Treasury Regulations taxing such income to this taxpayer are unconstitutional and void.

Explanation of deductions claimed in Column 7:

SCHEDULE C—PROFIT FROM SALE OF REAL ESTATE, STOCKS, BONDS, ETC. (See Instruction 6)

1. Kind of Property	2. Date Acquired	3. Amount Received	4. Depreciation Previously Allowed	5. Cost	6. Value as of March 1, 1913	7. Subsequent Improvements	8. Net Profit (Enter on Line 6)
							21,321 75

State how property was acquired

SCHEDULE D—CAPITAL NET GAIN OR LOSS FROM SALE OF ASSETS HELD MORE THAN TWO YEARS (See Instruction 6a)

1. Kind of Property	2. Date Acquired Mo. Day Year	3. Date Sold Mo. Day Year	4. Amount Received	5. Depreciation Previously Allowed	6. Cost	7. Value as of March 1, 1913	8. Subsequent Improvements, and Capital Expenditures	9. Net Profit (Enter Here and on Line 6a)
								6,628 26

State how property was acquired

SCHEDULE E—INTEREST ON LIBERTY BONDS AND OTHER OBLIGATIONS OR SECURITIES (See Instruction 8)

1. Obligations or Securities	2. Amount Received or Accrued	3. Amount Owned	4. Par Value Amount Exempt from Taxation	5. Amount Owned at Beginning of Taxable Year	6. Interest on Amount at Rates of Beginning of Taxable Year (Enter on Line 8)
(a) Obligations of a State, Territory, or political subdivision thereof, or the District of Columbia	$ 1,001 60		All	xxxxxx xx	xxxxxx xx
(b) Securities issued under Federal Farm Loan Act, or under such Act as amended			All	xxxxxx xx	xxxxxx xx
(c) Liberty 3½% Bonds and other obligations of United States issued before Sept. 1, 1917, and obligations of possessions of the United States			All	xxxxxx xx	xxxxxx xx
(d) Liberty 4% and 4½% Bonds, Treasury 4½% Bonds, Treasury Certificates, and Treasury (War) Savings Certificates			$8,000	$	$
(e) Liberty 4% and 4½% Bonds			$50,000		
(f) Treasury Notes			None		

EXPLANATION OF DEDUCTION FOR LOSSES BY FIRE, STORM, ETC., CLAIMED IN SCHEDULE A, AND IN ITEM 13

1. Kind of Property	2. Date Acquired	3. Cost	4. Value as of March 1, 1913	5. Subsequent Improvements	6. Depreciation Previously Allowed	7. Insurance and Salvage Value	8. Net Loss (Enter on Line 13)

EXPLANATION OF DEDUCTION FOR DEPRECIATION CLAIMED IN SCHEDULES A AND B

1. Kind of Property (If buildings, state material of which constructed)	2. Date Acquired	3. Life When Acquired	4. Remaining Life After Acquisition	5. Cost	6. Value as of March 1, 1913	Amount of Depreciation Claimed On: 7. Previous years	8. This year

Contributions

Englewood Hospital Building Fund	$2,499.99
East Side Y. M. C. A.	25.00
Trustees of Phillips Academy	15.00
Social Service Federation of Englewood	100.00
Englewood Hospital Assoc.	100.00
Bergen County Tuberculosis Assoc.	5.00
Tuberculosis Assoc., T. L. Lamont, Treas.	5.00
Union Theological Seminary	250.00
Total	$2,999.99

I swear (or
is a true and co

Sworn to a

my knowledge and belief,
r authority thereof.

100	shares	Kennecott Copper Company.
100	"	Standard Milling Company, common.
100	"	Central Aguirre Sugar, common.
100	"	Universal Leaf Tobacco, common.
50	"	Virginia Iron Coal & Coke, preferred.
500	"	Pennok Oil Company.
100	"	Loew's Inc.
50	"	Chemical Bank.

(Here follow Exhibits "B" and "C," side folios 25, 26, 27, and 28)

[fol. 29] "EXHIBIT D" TO COMPLAINT

Treasury Department, Washington

Office of Commissioner of Internal Revenue

IT:PA-3-6OD. JHJ

Dec. 9, 1926.

Mr. Charles A. Corliss, 131 Hudson Street, New York, New York.

SIR: The determination of your income tax liability for the taxable years 1922, 1923 and 1924, as set forth in office letter dated October 23, 1926 disclosed a deficiency in tax amounting to $44,910.88 for the year 1924, and an over-assessment amounting to $464.94 for the year 1923. The adjustments made are explained in detail in the attached statement.

In accordance with the provisions of Section 274 of the Revenue Act of 1926, you are allowed 60 days from the date of mailing of this letter within which to file a petition for the re-determination of this deficiency. Any such petition must be addressed to the United States Board of Tax Appeals, Earle Building, Washington, D. C., and must be mailed in time to reach the Board within the 60-day period, not counting Sunday as the sixtieth day.

[fol. 30] Where a taxpayer has been given an opportunity to file a petition with the United States Board of Tax Appeals and has not done so within the 60 days prescribed and an assessment has been made, or where a taxpayer has filed a petition and an assessment in accordance with the final decision on such petition has been made, the unpaid amount of the assessment must be paid upon notice and demand from the Collector of Internal Revenue. No claim for abatement can be entertained.

If you acquiesce in this determination and do not desire to file a petition with the United States Board of Tax Appeals, you are requested to execute a wa-ver of your right to file a petition with the United States Board of Tax Appeals on the inclosed Form A, and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:PA-3-6OD; JHJ. In the event that you acquiesce in a part of the determination, the waiver should be executed with respect to the items to which you agree.

Respectfully, D. H. Blair, Commissioner, by C. R. Nash, Assistant to the Commissioner.

Inclosures: Statement, Form A, Form 882.

[fol. 31] IT:PA-3-6OD. JHJ

Statement

Dec. 9, 1926.

In re Mr. Charles A. Corliss, 131 Hudson Street, New York, New York

Year	Deficiency	Overassessment
1922	None	.....
1923	.....	$464.94
1924	$44,910.88	.....

The report of the Supervising Internal Revenue Agent at New York, New York, transmitted to this office under date of September 29, 1926, has been reviewed and approved as submitted.

This assessment is in addition to all other outstanding and unpaid assessments appearing upon the Collector's lists.

Payment of the tax should not be made until a bill is received from the Collector of Internal Revenue for your district, and remittance should then be made to him.

The right of appeal as indicated on page one of this letter refers only to any deficiency in tax indicated herein inasmuch as there is no provision in the Revenue Act of 1926 granting the right of appeal against the determination of any overassessment found upon an audit of your return.

The overassessment shown herein will be made the subject of a Certificate of Overassessment which will reach you in due course through the office of the Collector of Internal [fol. 32] Revenue for your district. If the tax in question has not been paid, the amount will be abated by the Collector. If the tax has been paid, the amount of overpayment will first be credited against unpaid income tax for another year or years and the balance, if any, will be refunded to you by check of the Treasury Department. It will thus be seen that the overassessment does not indicate the amount which will be credited or refunded, since a portion may be an assessment which has been entered but not paid.

"Exhibit DD" to Complaint

Treasury Department, Washington

Office of Commissioner of Internal Revenue

Address reply to Commissioner of Internal Revenue and refer to IT:PA:6OD-Conf.

Dec. 11, 1927.

Mr. Charles A. Corliss, 131 Hudson Street, New York, New York.

Sir: Reference is made to an informal conference held in this office on February 7, 1927, with your representative, Russell D. Morrill, relative to deficiency in tax of $44,910.88 for the year 1924 as set forth in office letter dated December 9, 1926.

[fol. 33] As a result of the consideration of your contentions the entire amount of dividends received from a re-

vocable trust has been allowed as a credit before computing normal tax. An amount of $3,637.74 representing cost of administration amounting to $3,335.74 and loss on sale of assets amounting to $302.00 has been allowed as a deduction in arriving at your total net income.

An examination of the Revenue Agent's report discloses that your net income was increased by $85.00 representing taxable interest on Liberty Bonds in the amount of $2,000.00 held in excess of the exemption allowed, but the agent did not allow this amount as a credit before computing normal tax. In the following recomputation of your 1924 tax liability the above error has been corrected:

Total net income		$251,733.75
Less:		
Personal exemption	$2,500.00	
Liberty Bond interest	85.00	
Ordinary dividends	53,483.67	
Dividends from trust	123,521.25	
		$179,589.92
Income subject to normal tax		$72,143.83
Normal tax at 2% on $4,000.00		80.00
Normal tax at 4% on $4,000.00		160.00
Normal tax at 6% on 64,143.83		3,848.63
Surtax on $251,733.75		73,678.83
Total		$77,767.46
Less: 12½% on capital loss $8,628.26		1,078.53
Balance		$76,688.93

[fol. 34] Credits

25% of tax on earned net income	$55.00	
Tax paid at source	1.20	
		56.20
Total tax assessable		$76,632.73
Tax previously assessed		31,945.30
Deficiency in tax		$44,687.43

"EXHIBIT E" TO COMPLAINT

(EXECUTE SEPARATE FORM FOR EACH TAX PERIOD)

TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE
FORM 843—Jan. 1928
Comptroller General U. S.
January 12, 1928

CLAIM FOR

- ☐ ABATEMENT OF TAX ASSESSED
- ☐ CREDIT AGAINST OUTSTANDING ASSESSMENTS
- ☐ REFUND OF TAXES ILLEGALLY COLLECTED
- ☐ REFUND OF AMOUNTS PAID FOR STAMPS USED IN ERROR OR EXCESS

IMPORTANT
File with Collector of Internal Revenue where assessment was made. Not acceptable unless completely filled in.

TERMS ROTATION
Div.
Amount number
Date received
Stamp here
Collector of Internal Revenue

State of New York } ss:
County of New York }

NOTICE TO COLLECTOR
Collector must indicate in block above the kind of claim, except in Income Tax cases.

Date received by Administrative Unit
Stamp here

CHARLES A. CORLISS,
(Name of taxpayer or purchaser of stamps.)

TYPE OR PRINT

131 Hudson Street,
(Residence—give street and number as well as city or town and State.)

New York, New York.
(Business address.)

This deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below with reference to said statement are true and complete:

1. Business in which engaged Executive
2. Character of assessment or tax Income Tax
3. Amount of assessment or stamps purchased Additional tax plus interest $ 48,338.32
4. Reduction of Tax Liability requested (Income and Profits Tax) $ 48,338.32
5. Amount to be abated $
6. Amount to be refunded (or such greater amount as is legally refundable) $ 48,338.32
7. Dates of payment (see Collector's receipts or indorsements of canceled checks) March 11, 1927
   (If statement covers income tax liability, items 8-11, inclusive, must be answered.)
8. District in which return (if any) was filed Second District of New York.

PERIOD	YEAR
From: Jan. 1,	19
To: Dec. 31	19

"EXHIBIT E" TO COMPLAINT

(EXECUTE SEPARATE FORM FOR EACH TAX PERIOD)

TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE
FORM 843—Jan. 1925
Comptroller General U. S.
January 15, 1925

CLAIM FOR

- ☐ ABATEMENT OF TAX ASSESSED
- ☐ CREDIT AGAINST OUTSTANDING ASSESSMENTS
- ☐ REFUND OF TAXES ILLEGALLY COLLECTED
- ☐ REFUND OF AMOUNTS PAID FOR STAMPS USED IN ERROR OR EXCESS

For TREASURY DEPARTMENT USE
Date
Amount number
Date received
Stamp here
Collector of Internal Revenue

IMPORTANT
File with Collector of Internal Revenue where assessment was made. Not acceptable unless completely filled in.

State of New York } ss:
County of New York }

NOTICE TO COLLECTOR
Collector must indicate in block above the kind of claim, except in Income Tax cases.

Date received by Administrative Unit
Stamp here

CHARLES A. CORTISS,
(Name of taxpayer or purchaser of stamps.)

TYPE OR PRINT

131 Hudson Street,
(Residence—give street and number as well as city or town and State.)

New York, New York.
(Business address.)

This deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below with reference to said statement are true and complete:

		PERIOD	YEAR
1. Business in which engaged	Executive	From:	19
2. Character of assessment or tax	Income Tax	To: Dec. 31	19 2[illegible]
3. Amount of assessment or stamps purchased	Additional tax plus interest		$ 48,338.32
4. Reduction of Tax Liability requested (Income and Profits Tax)			$
5. Amount to be abated			$
6. Amount to be refunded (or such greater amount as is legally refundable)			$ 48,338.32
7. Dates of payment (see Collector's receipts or indorsements of canceled checks)	March 11, 1927		
(If statement covers income tax liability, items 8-11, inclusive, must be answered.)			
8. District in which return (if any) was filed	Second District of New York.		
9. District in which unpaid assessment appears			
10. Amount of overpayment claimed as credit			
11. Unpaid assessment against which credit is asked; period from	to		$

Deponent verily believes that this application should be allowed for the following reasons:

(The reasons appear in the attached statement, which is made a part hereof, this space being inadequate.)

This refund claim is executed by the taxpayer by Russell D. Morrill as Attorney in Fact of the taxpayer, pursuant to the authority contained in the power of attorney of the taxpayer, dated January 26, 1927, a copy of which is attached hereto.

(Attach additional sheets if necessary.)

Sworn to and subscribed before me this 11th day of March 27

(Sgd.) James McCarron,
Notary Public, etc.
(Seal)
(Title.)

Signed:
RUSSELL D. MORRILL, as Attorney-in-Fact of Charles A. Cortiss

(This affidavit may be sworn to before a Deputy Collector of Internal Revenue or Revenue Agent without charge.)

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The deficiency in tax shown above will be assessed immediately and you will receive demand notice for payment of the tax from the Collector of Internal Revenue for your district.

Respectfully, C. R. Nash, Assistant to the Commissioner.

(Here follows Exhibit "E," side folio 35)

[fol. 36] The taxpayer filed an income tax return for the year 1924, excluding from taxable income therein the net income of a revocable trust created by him on December 28, 1922, but reporting such income in a rider attached to the return as follows:

"This taxpayer is the grantor of a trust which, during all of 1924, was revocable. The income of such trust was payable to a beneficiary other than this taxpayer. The income of the trust in 1924 was as follows:

Dividends on stock of domestic corporations	$123,521.25
Other income	3,335.74
Loss on sale of securities by trustee	302.00
Interest on 4¼% Liberty Loan Bonds, principal amount $57,000	2,415.15
Exempt interest on municipal and state bonds	1,725.31

The above income is reported herewith, pursuant to Section 219 (g) of the Revenue Act of 1924 and the Regulations of the Treasury Department. The tax payable on this return has been computed, however, by this taxpayer without regard to such income, for the reason that this taxpayer believes and contends that the said provisions of the Revenue Act of 1924 and the Treasury Regulations taxing such income to this taxpayer are unconstitutional and void."

The taxpayer did not receive in the year 1924, and has never received, either directly or indirectly, any part of the [fol. 37] said trust income, which income was paid by Bankers Trust Company, the trustee of said trust, to the beneficiary named in the deed of trust.

By letter dated February 11, 1927 (IT:PA:60D-Conf.) the Commissioner of Internal Revenue notified the taxpayer of the determination of a deficiency in tax for the year 1924 of $44,687.43, which deficiency resulted from the inclusion in his taxable income of the income of the said revocable trust, as shown above.

The taxpayer subsequently received from the Collector of Internal Revenue a bill dated March 9, 1927, for an additional 1924 tax of $44,687.43, plus interest of $1,115.43, or an aggregate amount of $48,803.26. The bill showed a credit against the latter amount of $464.94 on account of an overassessment for the year 1923, and a net amount due of $48,338.32. The taxpayer paid such latter amount on March 11, 1927.

The taxpayer claims the refund of the said additional tax and interest paid for the year 1924, and interest thereon, on the ground that the provisions of the Revenue Act of 1924, and the Treasury Regulations pertaining thereto, taxing the income of the aforesaid revocable trust to this taxpayer, are unconstitutional and void.

Know all men by these presents, that I, Charles A. Corliss, do hereby appoint Walter S. Orr, Russell D. Morrill, and Henry Mannix of Messrs. White & Case, as my attorney and attorneys in my name and in my behalf to represent me in any and all proceedings between me and the Treasury Department of the United States Government relative to my income and profits tax liability or any other [fol. 38] tax liability for all years, granting unto my said attorneys and each of them full power to appear in my behalf before proper officials of the Treasury Department, and to adjust, settle, compromise or otherwise dispose of all questions relative to the said tax liability, and to receive any papers, letters or other communications concerning the same; and to execute and file in my behalf any and all claims whether refund or otherwise and whether relating to taxes already paid by me or which may be paid by me in the future.

In witness whereof, I have hereunto set my hand and seal this 26th day of January, 1927.

Charles A Corliss. (L. S.)

State of New York,
County of New York, ss:

On this 26th day of January, 1927, before me personally came Charles A. Corliss to me known and known to me to be the individual described in and who executed the foregoing Power of Attorney and acknowledged to me that he executed the same.

Raymond L. Turner, Notary Public, Nassau County.
Certificate filed in New York County, No. 38.
(Seal.)

[fol. 39] "EXHIBIT F" TO COMPLAINT

Treasury Department, Washington

Office of Commissioner of Internal Revenue

Address reply to Commissioner of Internal Revenue and refer to IT-C-PrA. EK-7.

Mar. 23, 1927.

Mr. Charles A. Corliss, % Mr. Russell D. Morrill, 131 Hudson Street, New York, N. Y.

SIR: Your claim for the refund of $48,338.32, individual income tax for 1924, has been considered.

The claim is based on the statement that income from a revocable trust, of which you were the grantor, was taxed to you under section 219 g) of the Revenue Act of 1924, and that the said provision of law and Treasury Regulations promulgated thereunder are unconstitutional and void.

In accordance with I. T. 2204, the taxability of the said trust income to the settlor is pursuant to the provision of law cited above, and Article 347 of Regulations 65.

It is held by this office that the law and regulation involved in the case are constitutional and not void, and that any question in respect of the validity thereof should [fol. 40] be the subject of judicial determination.

The claim will, therefore, be rejected.

This rejection will officially appear on the next schedule to be approved by the Commissioner.

Respectfully, C. R. Nash, by W. T. Sherwood, Head of Division.

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

OPINION

MACK, C. J.:

Motion to dismiss complaint in an action to recover income taxes collected pursuant to Section 219 (g) and (h) of the Revenue Act of 1924, 43 Stat. 277.

The complaint sets forth that in 1922, plaintiff established a "bona fide" trust of personalty, the income to be [fol. 41] paid to his wife with remainders over for his children. The instrument reserved to the settlor full control over the trust investments and provided:

"Notwithstanding anything to the contrary herein contained, the party of the first part may, from time to time, during the continuance of the trust by instrument in writing and acknowledged * * * modify or alter in any manner, or revoke in whole or in part, this indenture and the trusts then existing, and the estates and interests in property hereby created, and in case of such revocation said instrument shall direct the disposition to be made of the trust fund * * * and no one shall have any right, interest or estate under this indenture except subject to the proper modification, alteration or revocation thereof."

The complaint further shows that during the year 1924, the net income from the trust, $124,325.97, was paid over to the wife; and that plaintiff was assessed in respect thereto $44,687.43. The action is to recover this sum paid under protest.

The relevant statutory provisions are:

"(g) Where the grantor of a trust has, at any time during the taxable year, either alone or in conjunction with any person not a beneficiary of the trust, the power to revest in himself title to any part of the corpus of the trust, then the income of such part of the trust for such taxable year shall be included in computing the net income of the grantor.

[fol. 42] "(h) Where any part of the income of a trust may, in the discretion of the grantor of the trust, either alone or in conjunction with any person not a beneficiary of the trust, be distributed to the grantor or be held or

accumulated for future distribution to him, or where any part of the income of a trust is or may be applied to the payment of premiums upon policies of insurance on the life of the grantor (except policies of insurance irrevocably payable for the purposes and in the manner specified in paragraph (10) of subdivision (a) of section 214), such part of the income of the trust shall be included in computing the net income of the grantor."

The sole issues in this case are whether the statutory provisions are constitutional, and if so, whether they may constitutionally be applied to trusts created before their passage.

Under the Revenue Acts before that of 1924, there had been doubt and confusion as to whether the income from revocable trusts was taxable to the settlor or the beneficiary. Originally the settlor was held taxable; this administrative practice was reversed pursuant to an opinion by Solicitor Mapes of the Treasury Department (Cum. Bull. 1-2, p. 5, L. O. 1102). After the decision in Stoddard vs. Eaton, 22 F (2d) 184, the Department returned to its original practice. The Stoddard case is greatly limited by Warden vs. Lederer, 24 F. (2d) 233.

Meanwhile the committees of Congress in framing the 1924 Revenue Act sought, as the reports of both bodies said, "to prevent the evasion of taxes by means of estates and trusts." The report of the Senate Finance Committee also said:

[fol. 43] "The creation of a revocable trust constitutes nothing but an assignment of the right to future income. Since such an assignment does not operate to decrease the taxable income of the assignor, the creation of a revocable trust should not so operate, but the income of such trust should be included in the income of a grantor. The bill so provides."

It is properly conceded that the first sentence of the quotation from the Senate report is not a technically correct statement of the law. The creation of a revocable trust vests in the beneficiary a present estate in all respects valid until the power of revocation is exercised. Jones vs. Clifton, 101 U. S. 225; Van Cott vs. Prentice, 104 N. Y. 45. Bing vs. Bowers, 22 F. (2d) 450, a case within the language of the

quotation, illustrates the incorrectness of the quotation with respect to the present case. It was there held that a transfer of the right to the net proceeds of future rents from realty owned by and under the control of the donor was nothing but an assignment of the right to receive future income. Here the income arose from property equitably owned for life by the beneficiary; this income came immediately into her possession through the hands of the trustee. Plaintiff therefore argues that the holding in Eisner vs. Macomber, 252 U. S. 189, that Congress cannot constitutionally tax as income what is not in law income, logically implies that Congress cannot tax as plaintiff's income what is not his but his wife's income.

The Macomber case, however, is not authority for the proposition which plaintiff asserts. There Mr. Justice Pitney, f. 207, says:

"Here we have the essential matter: *Not* a gain *accruing* to capital, not a *growth* or *increment* of value *in* the invest-
[fol. 44] ment; but a gain, a profit, something of exchangeable value *proceeding* from the property, severed from the capital however invested or employed, and *coming in* being 'derived,' that is, *received* or *drawn by* the recipient (the taxpayer) for his *separate* use, benefit and disposal;—*that* is income derived from property."

But the context and the italicization show that the emphasis was not at all upon that part of the sentence which would be relevant here. The decision merely holds that since the power given by the Sixteenth Amendment was to tax income, only income could be taxed; there was no occasion to decide and there was no decision as against whom the income could be taxed. Regardless of whether or not the Solicitor of the Treasury Department was properly influenced by Eisner vs. Macomber in interpreting a doubtful statute, it is not a precedent on the present question of constitutionality.

It is abundantly clear from its legislative history that Congress passed the 1924 statute in order to prevent taxpayers from evading the surtaxes. The progressive rate is one of the vital features of the present system of income taxation. If income producing estates could be parcelled

out among donees having incomes in such a way that the donor paid no tax although he retained full powers of control and recapture, the surtax would be deprived of efficacy, and the income tax thereby greatly limited despite the fact that a tax at the basic rate would still be collectible.

It is not contended that the power to lay an income tax enables Congress to pass every statute necessary to an effi- [fol. 45] cient functioning of the income tax law in all its aspects. Just as the doctrine of Purity Extract Co. vs. Lynch, 226 U. S. 192, has its limits in the field of the police power, Weaver vs. Palmer Brothers Company, 270 U. S. 402, so too the correlative doctrine in the field of taxation has its limitation, Schlesinger vs. Wisconson, 270 U. S. 230. But within limits, Congress concededly has power to "prevent evasion and give practical effect to the exercise of admitted power" (Nichols vs. Coolidge, 274 U. S. 531, at 542). In my judgment, Congress remained within these limits when it taxed income to the settlor under the present circumstances.

The New York Court of Appeals rightly characterized the income from a revocable trust as proceeding from his bounty and subject to his control, Van Cott vs. Prentice, supra, pages 52-3. Such a trust may in New York be reached by creditors (Section 145 of Real Property Law) probably even when it is a trust of personalty. The trust property may of course by a proper instrument be sold by the settlor or the income therefrom transferred before its accrual to a third person, such acts being implied assertions of his unqualified right to repossession. In the present case taxpayer expressly reserved unfettered power to sell and deal with the securities in the corpus of the trust; this would in any event have been possible by the exercise of his power of revocation. Income arising from property so completely subject to the settlor's needs and wishes may properly be taxed to him in order to effectuate the purposes of the surtax provisions. The pleader's conclusion that the creation of the trust herein involved was "bona fide" may be disregarded, for insofar as it means anything it means that the settlor had in view other purposes than reduction [fol. 46] of his tax liability; this does not alter the fact that the purpose of the surtax provisions are set at naught by the revocable trust.

It is contended that even if a statute antedating the creation of a trust can constitutionally tax to the settlor the income accruing therefrom, a statute imposing such a tax passed after the creation of the trust although within the year when the income accrued, is unconstitutional. Certain decisions under the estate tax may seem by analogy to support the contention. Nichols vs. Coolidge, supra, held invalid an estate tax under a 1919 statute upon an interest coming into possession and enjoyment upon the settlor's death in 1921 by virtue of a deed of trust given in 1907. This case was followed by the Court of Appeals for the Second Circuit in Farmers Loan and Trust Company vs. Bowers, decided November 12, 1928, as to an interest under a trust subject until the settlor's death to revocation by the joint act of himself and the trustee. It has likewise been held in the state courts, which, however are confined within narrower constitutional limitations, that the transfer tax is not validly applicable to interests passing at death under revocable trusts created before the passage of the taxing statute, Matter of Miller, 236 N. Y. 290; Matter of Carnegie, 203 App. Div. 91, 36 N. Y. 517; but an exception is made as to revocable trusts in which not even a defeasible present estate had been enjoyed in possession by the beneficiaries before the settlor's death though they had taken a vested interest before the taxing statute, Matter of Schmidlapp, 236 N. Y. 278.

But these cases are not in point for several reasons. In the first place, the decision of Nichols vs Coolidge does not [fol. 47] condemn all retroactive taxation, but only such as imposes an arbitrary burden upon the taxpayer. The tax here under consideration does not involve any features of arbitrariness in valuation or otherwise; moreover the settlor had the unrestricted power to shift the tax to the recipient of his bounty, unlike the situation in the Farmers Loan and Trust case. In the second place, Reinecke vs. The Northern Trust Company, Sup. Ct., Jan. 2, 1929; U. S. Daily, Jan. 4, 1929; and Saltonstall vs. Saltonstall, 276 U. S. 260, hold that a taxing statute is not retroactive although enacted after the creation of the trust, if the trust remains revocable by the settlor after the statute becomes effective. These cases, however, might be distinguished on their facts because in them, unlike the instant case, the beneficiaries did not come into actual enjoyment of the property until

after the expiration of the settlor's life estate and the enactment of the statute. As to this see Matter of Schmidlapp, supra. In the third place, holdings that a statute imposing a tax upon the privilege of transferring the corpus of a trust must antedate the transfer, carry no implications that a statute imposing a tax upon the current year's income of a trust created before the statute is subject to the objection of retroactivity.

Motion to dismiss granted.

[fol. 48] IN UNITED STATES DISTRICT COURT

PETITION AND ORDER FOR APPEAL

The plaintiff feeling himself aggrieved by the judgment made and entered herein on the 21st day of January, 1929, dismissing the complaint and awarding the defendant judgment against him for $20., and by the order of this Court filed herein January 16, 1929 granting defendant's motion to dismiss the complaint, does hereby appeal from said judgment and order, and from each and every part thereof, to the United States Circuit Court of Appeals for the Second Circuit for the reasons specified in the Assignment of Errors which is filed herewith, and prays for an order allowing said plaintiff to prosecute said appeal, that a transcript of the record and proceedings on which said final judgment was made may be duly authenticated and sent to the United States Circuit Court of Appeals for the Second Circuit, and that a citation be issued directed to said Frank K. Bowers, as Collector of Internal Revenue for the Second District of New York, to appear before the said United States Circuit Court of Appeals for the Second Circuit to do and receive what may appertain to justice to be done in the premises.

And your petitioner will pray, etc.

Charles A. Corliss, by White & Case, Attorneys for Plaintiff, Charles A. Corliss, 14 Wall Street, New York City.

[fol. 49] The foregoing appeal from the order entered herein on January 16, 1929, and the judgment entered herein on January 21, 1929 be and the same hereby is allowed.

Dated February 5, 1929.

J. W. Mack, U. S. D. J.

In United States District Court

Assignment of Errors

Charles A. Corliss conceiving himself aggrieved by the final judgment entered herein on January 21, 1929, and the order of Judge Julian W. Mack filed herein on January 16, 1929, now appears by his attorneys and presents with his notice of appeal, the following assignment of errors:

1. The Court erred in holding that the Bill of Complaint herein states no cause of action against the defendant.

2. The Court erred in dismissing the Bill of Complaint herein.

3. The Court erred in holding that Section 219 (g) of the Revenue Act of 1924 is constitutional.

[fol. 50] 4. The Court erred in holding that Section 219 (h) of the Revenue Act of 1924 is constitutional.

5. The Court erred in holding that the provisions of Section 219 (g) and (h) of the Revenue Act of 1924 have any application to income of revocable trusts created prior to June 2, 1924, the date the said statute became effective.

6. The Court erred in holding that Section 219 (g) and (h) of the Revenue Act of 1924 have any application to the income of revocable trusts accrued to or received by the Trustee between January 1, 1924, and June 2, 1924.

7. The Court erred in holding that the taxing statute in question, viz., Section 219 (g) and (h) of the Revenue Act of 1924 was retroactive.

8. The Court erred in holding that the tax sought to be levied b ythe Revenue Act of 1924, Section 219 (g) and (h) was authorized by the provisions of the Sixteenth Amendment to the Constitution of the United States.

9. The Court erred in holding that the tax sought to be levied under the provisions of Section 219 (g) and (h) of the Revenue Act of 1924 did not violate the provisions of the Fifth Amendment to the Constitution of the United States.

10. The Court erred in not holding that the taxing statute in question, viz., Section 219 (g) and (h) of the

Revenue Act of 1924 was unconstitutional by reason of the provisions of Section 2, Clause 3, and Section 9, Clause [fol. 51] 4, of Article 1 of the Constitution of the United States.

Wherefore said plaintiff prays that the judgment and order appealed from may be reserved and corrected and that a decree may be made sustaining said complaint.

Dated New York, February 4, 1929.

Yours, etc., White & Case, Attorneys for Plaintiff, 14 Wall Street, New York City.

[fol. 52] Citation, in usual form, omitted in printing.

[fol. 53] In United States District Court

[Title omitted]

Stipulation as to Record

It is hereby stipulated and agreed that the foregoing is a true transcript of the Record of said District Court in the above entitled action, as agreed upon by the parties.

Dated February 28, 1929.

White & Case, Attorneys for Plaintiff. Charles H. Tuttle, United States Attorney, Attorney for Defendant.

[fol. 54] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 55] In United States Circuit Court of Appeals, Second Circuit

Charles A. Corliss, Plaintiff-Appellant,

against

Frank K. Bowers, as Collector of Internal Revenue for the Second District of New York, Defendant-Appellee

Before Manton, L. Hand, and Chase, Circuit Judges

Appeal from the District Court for the Southern District of New York. Action to recover income taxes paid by the

plaintiff under duress. On motion, a judgment was entered dismissing the complaint; plaintiff appeals. Judgment affirmed.

OPINION

MANTON, Circuit Judge:

On December 29, 1922, appellant delivered a trust indenture to the trustee therein named, the Bankers Trust Company of New York City, together with corporate stocks and securities listed in the schedule annexed to [fol. 56] the indenture. It was a trust revokable at any time at the will of the settlor. The trustee was obligated to collect the income from the securities and pay them to the appellant's wife for the term of her life. Upon her death the principal of the trust was then to be paid in equal shares to the appellant's children then living and the issue of any deceased child or children, and in default thereof, to such persons as appellant's wife might designate and appoint. The trust was conceded to be valid under the laws of the State of New York. By its terms, the appellant reserved the right, in addition to revocation, to modify or alter in any manner, in whole or in part, the indenture and trust created thereby. The trust remained in this form in 1924 when the income for that year was paid by the trustee to the appellant's wife. The appellant received none of it. In appellant's report of his income for that year, he made note of this trust and the amount of the income, but claimed exemption from tax. He was later assessed $44,687.43 with interest on the income so paid to his wife, which he has paid under protest and now sues to recover it.

The appellant's contention is that § 219 (g-h) of the Act of 1924 (43 Stat. 277) under which this assessment was made, is unconstitutional because it requires him to pay a tax upon the income of another and, if it be constitutional, it is retroactive and therefore invalid as applied to income for 1924 upon the trust created in 1922. Section 219 provides:

"(g) Where the grantor of a trust has, at any time during the taxable year, either alone or in conjunction with any person not a beneficiary of the trust, the power to re- [fol. 57] vest in himself title to any part of the corpus of

the trust, then the income of such part of the trust for such taxable year shall be included in computing the net income of the grantor.

"(h) Where any part of the income of a trust may, in the discretion of the grantor of the trust, either alone or in conjunction with any person not a beneficiary of the trust, be distributed to the grantor or be held or accumulated for future distribution to him, or where any part of the income of a trust is or may be applied to the payment of premiums upon policies of insurance on the life of the grantor (except policies of insurance irrevocably payable for the purposes and in the manner specified in paragraph (10) of subdivision (a) of section 214), such part of the income of the trust shall be included in computing the net income of the grantor."

The moneys paid to the appellant's wife, as income from this trust, were taxable to her (Irwin vs. Gavit, 268 U. S. 161) prior to the 1924 Act. The trust indenture vested the legal title to the corpus of the estate in the trustee. (Jones vs. Clifton, 101 U. S. 225; The Farmers Loan & Trust Co. vs. Bowers, 29 Fed. [2nd] 14.) The present estate vested in the beneficiary, created by this revokable trust, was valid until the power of revocation was exercised. The question here is whether Congress had the power to tax the grantor of the trust for income paid to the beneficiary where the money, as income in the hands of the trustee, was paid to the beneficiary therein named. In Taft vs. Bowers (278 U. S. 470), an increase in the value of a gift accruing prior to the time the gift was made, while in the hands of the donor, was held to be subject to a tax to be paid by the donee when she, at a later date, sold the securities. A husband was held subject to the payment of a tax upon the whole of the income of community property held under a state statute of California and owned jointly by husband and wife in United States vs. Robbins (269 U. S. 315).

[fol. 58] Section 219, according to the legislative debates, was enacted to "secure clarity and prevent the evasion of taxes by means of estates and trusts". (House of Rep., Vol. 1, 68th Cong. 1st Session, dealing with H. R. 6715 [1924] Revenue Act, Senate Reports Vol. 1, p. 25 [1924]; 68th Congress, 1st Session, Vol. 4, p. 19-20). Congress, by

the 16th Amendment, was granted power to lay and collect taxes on incomes and we think, under the principle of the cases referred to, it could command a settlor of a revokable trust to pay a tax on income paid to a beneficiary in the scheme of lawful taxation if the method devised by Congress does not become arbitrary or capricious and violate the 5th amendment. A settlor of a revokable trust has a sufficient interest in the income of the trust and a relation thereto to justify the claim of a necessity for a fair and proper tax imposition requiring the settlor to pay. He, at all times, has the power to make the income derived from the trust, his own. To defeat tax evasion, at least the higher surtax, Congress, by this statute, has determined that a grantor who may change or modify the gift, even to putting an end to its continuance, must pay. By such a trust indenture, the grantor gives and the grantee receives with knowledge of who shall bear the burden of taxation. There is no constitutional reason against subjecting the settlor to such a tax and the 16th Amendment grants very general taxing power. (Brushaber vs. Union Pacific R. R. Co., 240 U. S. 1; Frew vs. Bowers, 12 Fed. [2nd] 625). If the taxation involves reasonableness to meet the desired ends of fair play, it is valid. (Nichols vs. Coolidge, 274 U. S. at 542.) And when the tax is arbi- [fol. 59] trary or capricious by reason of the terms of the taxing statute, it becomes void under the 5th Amendment. Where the trust is revokable, it is not unfair to tax the person who always has a will he may exercise and divert from the recipient a part or all of the income. As was said by us in Mitchell vs. Bowers (15 Fed. [2nd] 287), "Throughout the period the right of disposition remained."

By § 145 of the New York Real Property Law (where this indenture was made) when the grantor in the conveyance reserves to himself for his own benefit, a power of revocation, he is deemed the absolute owner of the estate conveyed so far as the rights of creditors and purchasers are concerned, illustrating how little the beneficiary obtains apart from the income. Under the federal Estate Tax Law, the terms "gross income" includes trust funds conveyed by a revokable indenture. (Reinecke vs. Northern Trust Co., 278 U. S. 339; Chase Natl. Bank vs. United States, 278 U. S. 327). This is because the grantor at all times had the power to make the funds his and the non-exercise of

the power is as much evidence of testamentary disposition as the exercise would be. The settlor might, if he wished, make each income payment under the grant his own. This he could do by exercising his power of revocation. Congress has expressed a sufficient reason and from the viewpoint of a revenue act, it is reasonable, if not commendable. This exercise of power, based upon reason for taxation, is within the power of Congress in its desire to prevent evasion and gives practical effect to the exercise of its admitted power. (Nichols vs. Coolidge, supra).

[fols. 60 & 61] The tax involved here is for the year 1924 and the indenture was made in 1922. It is argued that even if the statute is valid, it cannot be constitutional as applied to a trust created prior to its effective date. This assumed retroactivity. ' It does not invalidate the statute. The statute deals with the present condition with revocability residing in the settlor. Each payment of income which takes place after the passage of the statute is subject to its terms. Therefore, after the effective date of the taxing statute, this income was subject to taxation under its requirements. The taxing statute is not retroactive. (Reinecke vs. Northern Trust Co., supra; Chase Natl. Bank vs. United States, supra; Saltonstall vs. Saltonstall, 276 U. S. 260).

Judgment affirmed.

[fol. 62] In United States Circuit Court of Appeals, Second Circuit

Present: Hon. Martin T. Manton, Hon. Learned Hand, Hon. Harrie B. Chase, Circuit Judges.

Charles A. Corliss, Plaintiff-Appellant,

v.

Frank K. Bowers, as Collector, etc., Defendant-Appellee

Appeal from the District Court of the United States for the Southern District of New York

Decree—Filed July 1, 1929

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is, affirmed, with costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[File endorsement omitted.]

[fol. 63] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 64] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 21, 1929

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 34,475. U. S. Circuit Court of Appeals, Second Circuit. Term No. 344. Charles A. Corliss, petitioner, vs. Frank K. Bowers, as Collector of Internal Revenue for the Second Distrct of New York. Petition for writ of certiorari and exhibit thereto. Filed August 27, 1929. File No. 34,475.

PETITION FOR A WRIT OF CERTIORARI

FILE COPY

FILED
AUG 27 1929
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1929.

No. 344

CHARLES A. CORLISS, PETITIONER,

v.

FRANK K. BOWERS, AS COLLECTOR OF INTERNAL REVENUE FOR THE SECOND DISTRICT OF NEW YORK, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

JOSEPH M. HARTFIELD,
Counsel for Petitioner.

RUSSELL D. MORRILL,
A. C. NEWLIN,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1929.

No.

CHARLES A. CORLISS, PETITIONER,

v.

FRANK K. BOWERS, AS COLLECTOR OF INTERNAL REVENUE FOR THE SECOND DISTRICT OF NEW YORK, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of Charles A. Corliss, the plaintiff, appellant below, respectfully shows as follows:

I. That this suit was brought in the United States District Court for the Southern District of New York to receiver federal income taxes paid by the petitioner to the respondent for the calendar year 1924, amount-

ing to $44,687.43, plus interest of $4,115.83, on the grounds that the Act of Congress approved June 2nd, 1924, and known as the "Revenue Act of 1924" (43 Stats. 253) was unconstitutional and void, in so far as the same had been asserted to exact said tax from petitioner, for the reason that it violated the provisions of Article I, Section 2, Clause 3, and Section 9, Clause 4, of the Constitution of the United States, and the Fifth and Sixteenth Amendments thereto.

II. The material allegations of the complaint in said action may be summarized as follows:

On December 29, 1922, the plaintiff, in New York City, delivered to Bankers Trust Company, a New York corporation, a trust indenture, a copy of which was annexed to the complaint (R. p. 15), and at the same time delivered to the trustee corporate stocks and bonds listed in the schedule annexed to the indenture. Under the terms of the trust indenture the securities listed in the schedule annexed thereto were assigned to the trustee, which was required to collect the income therefrom and to pay the same to Anne Parrish Corliss, the plaintiff's wife, for the term of her life. The indenture directs that upon the death of the life beneficiary the principal of the trust shall be paid in equal shares to the children of the plaintiff then living and to the issue of any deceased children and, in default thereof, to such persons as Anne Parrish Corliss shall in her Will designate and appoint.

The complaint expressly alleges that the trust so created "constituted a *bona fide* valid trust under the laws of the State of New York" (R. p. 6).

In the trust indenture the plaintiff reserved the right to "modify or alter in any manner, or revoke in whole or in part," the indenture and trusts created thereby (R. p. 20). The plaintiff at no time exercised any of such powers, and in the year 1924 the trustee paid over to Anne Parrish Corliss, the beneficiary, the entire net income from the trust for that year, amounting to $124,325.97. None of the income of the trust was paid or credited to the plaintiff or received by him in 1924, or in any other year.

Plaintiff reported no part of the income of the trust as taxable to him for the year 1924, but attached to his income-tax return for that year a rider disclosing the amount of the trust income and claiming an exemption from tax thereon. An additional tax of $44,687.43, with interest of $4,115.83, was thereafter assessed against the plaintiff, such assessment resulting solely from the inclusion in plaintiff's net income in 1924 of the net income of the trust ($124,325.97), all of which was paid to the beneficiary under the terms of the indenture. Plaintiff paid the additional tax and interest so assessed, and his claim for the refund thereof was rejected by the Commissioner of Internal Revenue.

III. Respondent Bowers filed a motion to dismiss the complaint of the petitioner and on the hearing in the District Court said motion was granted, the Court holding that subdivisions (*g*) and (*h*) of Section 219 of the Revenue Act of 1924 were constitutional, and were constitutional as applied to the income of a revocable trust created prior to their enactment. Said subdivisions read as follows:

"(*g*) Where the grantor of a trust has, at any time during the taxable year, either alone or in conjunction with any person not a beneficiary of the trust, the power to revest in himself title to any part of the corpus of the trust, then the income of such part of the trust for such taxable year shall be included in computing the net income of the grantor.

"(*h*) Where any part of the income of a trust may, in the discretion of the grantor of the trust, either alone or in conjunction with any person not a beneficiary of the trust, be distributed to the grantor or be held or accumulated for future distribution to him, or where any part of the income of a trust is or may be applied to the payment of premiums upon policies of insurance on the life of the grantor (except policies of insurance irrevocably payable for the purposes and in the manner specified in paragraph (10) of subdivision (*a*) of Section 214), such part of the income of the trust shall be included in computing the net income of the grantor."

IV. On appeal to the Circuit Court of Appeals for the Second Circuit the judgment of the District Court was unanimously affirmed. Three months have not elapsed since the entry of the order for mandate of the said Circuit Court of Appeals.

V. The statutory provisions in question represent a decided departure in income-tax legislation and raise important questions as to the constitutional limitations of Congress in such matters. The outcome of the case is a matter of great public interest and nation-wide

importance by reason of the numerous revocable trusts which will be affected thereby, and by reason of the effect which it will have on many other proceedings that now await the final disposition of this case.

VI. For the reasons set forth in the annexed brief your petitioner believes that the decisions of the said District Court and of the said Circuit Court of Appeals were erroneous and contrary to law, and that this honorable Court should require the case to be certified to it for review and determination in conformity with the Acts of Congress in such case made and provided.

WHEREFORE your petitioner respectfully prays that a Writ of Certiorari may issue out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding the said Court to certify and transmit to this Court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the said case therein entitled "Charles A. Corliss, Plaintiff-Appellant, against Frank K. Bowers, etc., Defendant-Appellee" (No. L—39—354), to the end that the said case may be reviewed and determined in this Court, as provided by Judicial Code, Section 240, as amended by Act of February 13, 1925 (43 Stats. 938), or that your petitioner may have such other relief or remedy in the premises as to this Court may seem appropriate and in conformity with the said Act, and that the said judgment of the said Circuit Court of Appeals

in the said case, and every part thereof, may be reversed by this honorable Court.

CHARLES A. CORLISS,
Petitioner,
By JOSEPH M. HARTFIELD,
Counsel.

Dated New York City, August —, 1929.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1929.

No.

CHARLES A. CORLISS, PETITIONER,

v.

FRANK K. BOWERS, AS COLLECTOR OF INTERNAL REVENUE FOR THE SECOND DISTRICT OF NEW YORK, RESPONDENT.

BRIEF IN SUPPORT OF PETITION.

Statement.

This action was commenced in the United States District Court for the Southern District of New York to recover Federal Income Taxes amounting to $44,687.43, plus interest of $4,115.83, paid by petitioner to respondent for the year 1924, on the ground that the provisions of the Revenue Act of 1924 which taxed to the donor the income of a revocable trust were unconstitutional. The material facts are set forth in Paragraph II of the accompanying petition.

The District Court rendered a judgment dismissing the complaint on January 21, 1929. A copy of the Court's opinion will be found at page 40 of the Record. The case is reported in 30 Fed. (2nd) 135. The Circuit Court of Appeals for the Second Circuit unanimously affirmed the judgment of the District Court. The opinion of the Circuit Court is not yet officially reported, but will be found at page 55 of the Record.

The Order for Mandate of the Circuit Court was filed July 1, 1929. The petitioner relies on Judicial Code Section 240, as amended by Act of February 13, 1925 (43 Stats. 938), as authority for the jurisdiction of this Court.

POINT I.

This action attacks the constitutionality of an important provision of the Revenue Act of 1924 and the corresponding provisions of the subsequent revenue acts, and raises questions of general and great immediate importance which have never been, but should be, decided by this Court.

As will appear from an examination thereof as set forth in the accompanying petition, subdivisions (*g*) and (*h*) of Section 219 of the Revenue Act of 1924 (in its relevant provisions) provided for the taxation to the donor of the income of a revocable trust, and of that part of the income of a trust which, under the terms of the trust indenture, might be distributed to the donor. In other words, the statute provided that income should be taxed to an individual who admittedly did not, and who, at the time of its payment, had no

right to, receive such income. Similar provisions are contained in all of the Federal Income Tax Acts since 1924.

Prior to the Revenue Act of 1924 the rule was otherwise and the beneficiaries of revocable trusts paid the taxes on trust income received by them. In L. O. 1102, I-2 Cumulative Bulletin 50, Mr. Carl A. Mapes, the then Solicitor of Internal Revenue, ruled that the Treasury Department could not tax the donor of a revocable trust on income which was received by another, citing *Eisner* v. *Macomber*, 252 U. S. 189, wherein it is stated that the tax is imposed upon income "received or drawn by the recipient" (p. 207). By the Revenue Act of 1924, therefore, Congress assumed authority to tax income of a revocable trust to either one of two persons, the grantor or the beneficiary. Such action raises questions of great and fundamental importance as to the constitutional limitations imposed on Congress in such matters.

So far as counsel have been able to ascertain, this Court has never passed upon the question of the constitutionality of such an act of Congress, nor, indeed, has this Court ever passed upon a case involving principles similar to those presented by this case. The recent decision of this Court in the case of *Taft* v. *Bowers* (49 Sup. Ct. 129) is not controlling. The statute reviewed in that decision provided that the tax should be borne by the recipient of the sum upon which the tax was imposed. Also, if the donee in the *Taft* case had not been taxed on the appreciation accruing in the hands of the donor, such appreciation would have

escaped taxation altogether, whereas in the present case, if the statute in question is unconstitutional, it is admitted that the tax on the trust income can be assessed against the beneficiary. For these reasons alone the *Taft* case is clearly distinguishable from the case at bar.

Since the statute involved represents a decided departure in income-tax legislation and since it raises such important and novel constitutional questions, it is submitted that this Court should pass upon the question of its validity.

Furthermore, the case raises a question of great public interest and nation-wide importance because of its immediate practical application. There are numerous revocable trusts now in existence and many others are constantly being created. Many of said trusts were created prior to March 1, 1913, the date when the present system of income taxation was first made effective. Many others were created prior to June 2, 1924, the effective date of the statute presently involved. All of said trusts will be affected by the decision in the present case and the correct administration of said trusts will be in doubt until the case is finally decided. Also, numerous taxpayers have filed with the Treasury Department claims for the refund of taxes paid pursuant to the statutory provisions in question. Many other taxpayers have filed petitions with the United States Board of Tax Appeals for review of the action of the Treasury Department in assessing them under this statute. Suits similar to the present action have been instituted in other courts and

the United States District Court for the Western District of Pennsylvania in the case of *Clapp* v. *Heiner* (not yet reported) has decided one of such cases by following the decision of District Judge Mack in the instant case. The termination of all of these various proceedings is awaiting the final outcome of the present case.

The importance of the case is so readily apparent that elaboration on the point would seem unnecessary.

Point II.

The Circuit Court of Appeals and the District Court erred in holding that subdivisions (g) and (h) of Section 219 of the Revenue Act of 1924 were constitutional.

A revocable trust vests the legal title to the *corpus* of the trust in the trustee and, until the exercise of the power of revocation reserved by the grantor, the transfer, so far as the material here, is as complete and effective when made as though the trust had been irrevocable.

Jones v. *Clifton*, 101 U. S. 225;
The Farmers' Loan and Trust Company v. *Bowers*, 29 Fed. (2nd) 14;
Van Cott v. *Prentice*, 104 N. Y. 45, 10 N. E. 257;
Nichols v. *Emery*, 109 Cal. 323, 41 Pac. 1089;
Dickerson's Appeal, 115 Pa. 198, 8 Atl. 64.

Therefore the effect of the statute, baldly stated, is to tax A upon the income of B. Such procedure is arbitrary and capricious in the extreme.

Clearly, Congress does not have power to tax the income from an irrevocable trust to the donor, and the power of revocation is not material here. The taxing statute is concerned with income, not with principal. Regardless of the existence of a power of revocation, the income once accrued is completely and irrevocably the beneficiary's income, in which the donor has no interest and over which he has no control. Therefore, since the tax is a direct tax on income, by the same token that the income from an irrevocable trust must be taxed to the beneficiary, the income from a revocable trust must be likewise so taxed.

Congress cannot by any definition declare that to be income which is not income. *Eisner* v. *Macomber*, 252 U. S. 189. Therefore, Congress cannot by mere edict declare to be the income of A the income from securities the legal title to which was not vested in A, and when in fact another person was entitled to and actually received such income. Such action on the part of Congress as to petitioner is an act of confiscation in direct violation of the Fifth Amendment to the Constitution.

The taxation of the petitioner upon the income of the trust beneficiary cannot be justified as necessary to the enforcement of an admitted constitutional power. The income from a revocable trust can be taxed to the beneficiary who receives the same. *Irwin* v. *Gavit*, 268 U. S. 161. The income from a revocable trust being thus taxable, there is no necessity for invoking any ancillary constitutional power that Congress may have. The mere desire of Congress to con-

centrate incomes in such a manner as to yield a mexi-mum *rate of tax* does not create a necessity justifying the disregard of accepted principles of constitutional and trust law.

POINT III.

The Circuit Court of Appeals and the District Court erred in holding that the statutory provisions in question were constitutional as applied to the income of a revocable trust created prior to June 2nd, 1924, the effective date of the Revenue Act of 1924.

Nichols v. *Coolidge*, 274 U. S. 531;
Brushaber v. Union Pacific Railroad Co., 240 U. S. 1;
The Farmers' Loan and Trust Company v. Bowers, supra;
Barclay v. *Edwards & Co.*, 267 U. S. 442, 450.

Conclusion.

A Writ of Certiorari should be granted in order that petitioner may have the judgment of this Court upon the important questions involved herein.

Respectfully submitted,

JOSEPH M. HARTFIELD,
Counsel for Petitioner.

RUSSELL D. MORRILL,
A. C. NEWLIN,
Of Counsel.

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FEB 18 1930

CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States,

OCTOBER TERM, 1929.

No. 344.

CHARLES A. CORLISS,
Plaintiff-Appellant,

against

FRANK K. BOWERS, AS COLLECTOR OF INTERNAL REVENUE FOR THE SECOND DISTRICT OF NEW YORK,
Defendant-Respondent.

BRIEF OF PLAINTIFF-APPELLANT.

JOSEPH M. HARTFIELD,
Counsel for Appellant.

RUSSELL D. MORRILL,
A. C. NEWLIN,
Of Counsel.

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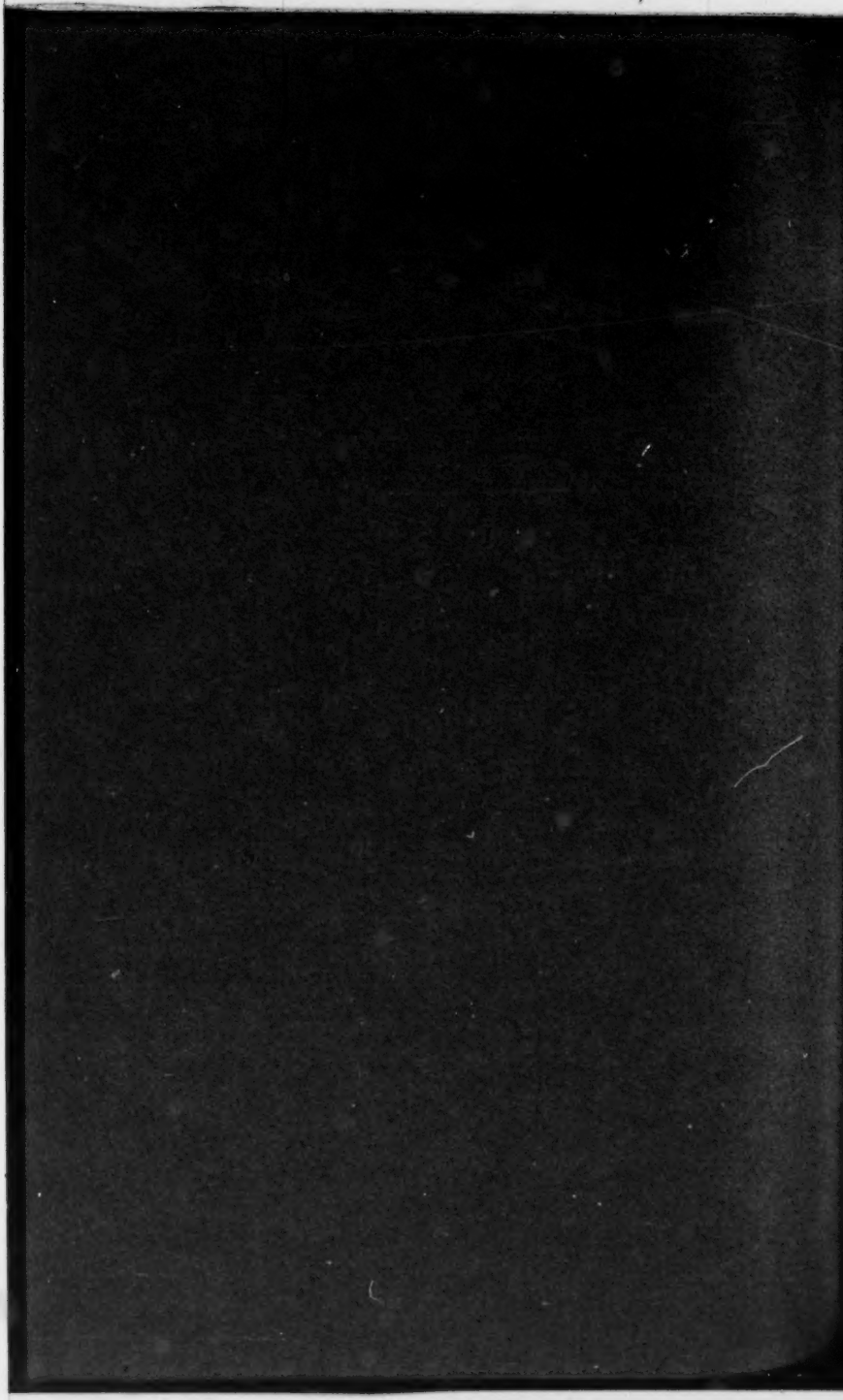

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Supreme Court of the United States.

OCTOBER TERM, 1929

No. 344

CHARLES A. CORLISS,
Plaintiff-Appellant,

against

FRANK K. BOWERS, as Collector of Internal Revenue for the Second District of New York,
Defendant-Respondent.

BRIEF OF PLAINTIFF-APPELLANT.

Statement.

This action was commenced in the District Court of the United States for the Southern District of New York on April 4, 1927 to recover federal income taxes amounting to $48,338.32 paid by appellant to respondent for the calendar year 1924, on the ground that the provisions of the Revenue Act of 1924 which taxed to the donor the income of a revocable trust, were unconstitutional and void. To the complaint of the appellant the respondent filed a motion to dismiss on the ground that the complaint fails to state a cause of action. (R., fol. 4) The District Court rendered a judgment dismissing the complaint on July 21, 1929. (R., fol. 3) The opinion of the District Court (R., pp. 22-27) is reported in 30 Fed. (2d) 135. An appeal was taken from this judgment to the Circuit Court of Appeals for the Second

Circuit. The Circuit Court unanimously affirmed the judgment of the District Court by decree dated July 1, 1929. (R., fol. 62) The opinion of the Circuit Court (R., pp. 29-33) is reported in 34 Fed. (2d) 656.

The appellant thereupon petitioned to this Court for a writ of certiorari to the said Circuit Court. The order allowing certiorari was filed October 21, 1929. (R., fol. 64)

The appellant relies upon the Judicial Code, Sec. 240, as amended by Act of February 13, 1925 (43 Stat. 938), as authority for the jurisdiction of this Court.*

The Complaint.

The material allegations of the complaint (R., pp. 3-21) which has been dismissed as failing to state a cause of action may be summarized as follows:

On December 29, 1922, the appellant, in New York City, delivered to Bankers Trust Company, a New York corporation, a trust indenture, a copy of which is annexed to the complaint (R., fols. 15-23) and at the same time delivered to the trustee corporate stocks and bonds listed in the schedule annexed to the indenture. (R., fol. 24) Under the terms of the trust indenture the securities listed in the schedule annexed thereto were assigned to the trustee, which was required to collect the income therefrom and to pay the same to Anne Parrish Corliss, the appellant's wife, for the term of her life. The indenture directs that upon the death of the life beneficiary the principal of the trust shall be paid in equal shares to the children of the appellant then living and the issue of any deceased children, and, in default thereof,

* The United States District Court for the Western District of Pennsylvania in the case of *Clapp* v. *Heiner,* 34 F. (2d) 506, has rendered a decision in a similar case which follows the decision of District Judge Mack in the instant case.

o such persons as Anne Parrish Corliss shall in her will esignate and appoint.

The complaint expressly alleges that the trust so created constituted a bona fide, valid trust under the laws of the tate of New York". (R., fols. 6-7)

In the trust indenture the appellant reserved the right to modify or alter in any manner, or revoke in whole or in art" the indenture and the trusts and estates created hereby. (R., fol. 20) The appellant at no time exercised ny of such powers and in the year 1924 the trustee paid ver to Anne Parrish Corliss, the beneficiary, the entire net ncome of the trust for that year, amounting to $124,325.97. R., fol. 7) None of the income of the trust was paid or redited to the appellant or received by him in 1924, or in ny other year. (R., fol. 8) Appellant reported no part of he income of the trust as taxable to him for the year 1924, ut attached to his income tax return a rider disclosing the mount of the trust income and claiming exemption from tax hereon. (R., fols. 8-9) An additional tax of $44,687.43 ith interest of $4,115.83 was thereafter assessed against the ppellant, such assessment resulting solely from the inclusion n the appellant's net income for 1924 of the net income of he trust (R., fol. 10), all of which had been paid to the eneficiary under the terms of the trust indenture. Appel- nt paid the additional tax and interest so assessed (R., fol. 0) and his claim for the refund thereof was rejected by the ommissioner of Internal Revenue. (R., fol. 11)

The Issues.

The sole issues involved are whether subdivisions (g) and h) of Section 219 of the Revenue Act of 1924 are constitu- ional and, if so, whether they are constitutional as applied o trusts created prior to the enactment of the 1924 Revenue ct.

The Statute and Its Historical Background.

The pertinent subdivisions of Section 219 of the Revenue Act of 1924 read as follows:

> "(g) Where the grantor of a trust has, at any time during the taxable year, either alone or in conjunction with any person not a beneficiary of the trust, the power to revest in himself title to any part of the corpus of the trust, then the income of such part of the trust for such taxable year shall be included in computing the net income of the grantor.
>
> "(h) Where any part of the income of a trust may, in the discretion of the grantor of the trust, either alone or in conjunction with any person not a beneficiary of the trust, be distributed to the grantor or be held or accumulated for future distribution to him, or where any part of the income of a trust is or may be applied to the payment of premiums upon policies of insurance on the life of the grantor (except policies of insurance irrevocably payable for the purposes and in the manner specified in paragraph (10) of subdivision (a) of section 214), such part of the income of the trust shall be included in computing the net income of the grantor."

Prior to the Revenue Act of 1924, none of the federal income tax laws contained any special provision pertaining to revocable trusts. Under the express terms of such laws the recipients of trust income were taxable thereon. The Treasury Department, however, took the position as early as 1916, that the income of revocable trusts was taxable to the grantor of the trust even though paid to a beneficiary other than himself. This position being clearly unsound under the Revenue Acts of 1916, 1918 and 1921, the pertinent regulations of the Treasury Department were generally disregarded by grantors of such trusts, who were sustained in their position by the Solicitor of Internal Revenue when the question was presented for legal review in 1922.

In that year, Mr. Carl A. Mapes, the then Solicitor of Internal Revenue, rendered an exhaustive opinion (L. O.

1102, Cumulative Bulletin I-2, page 50), in which he held that income received by beneficiaries other than the grantor of the revocable trust under consideration did not constitute income of the grantor and was not taxable to him as such. As a result of this opinion, the Treasury Department thereafter published a ruling (I. T. 1589, II-1 C. B. 51) which provided that L. O. 1102 was applicable to all income tax laws, and concluded:

> "The nature of the return required and the liability for the payment of tax in the case of a revocable trust are determined in the same manner as in the case of trusts which are not revocable."

This ruling remained effective for all years prior to the year 1924, with the result that beneficiaries of revocable trusts have paid taxes for such years upon trust income received by them.

In proposing the inclusion of subdivisions (g) and (h) of Section 219 in the Revenue Act of 1924, the Report of the Finance Committee of the Senate (Vol. I, Senate Reports, Sixty-Eighth Congress, First Session, at p. 25) states:

> "Sec. 219: This section has been rewritten in order to secure clarity and to prevent the evasion of taxes by means of estates and trusts.
>
> * * * * * *
>
> "The creation of a revocable trust constitutes nothing but an assignment of the right to receive future income. Since such an assignment does not operate to increase (*sic*) the taxable income of the assignor, the creation of a revocable trust should not so operate, but the income of such trust should be included in the income of a grantor. The bill so provides."

From the context, it is apparent that the Committee intended to use the word "decrease" instead of "increase" where the latter appears in the above quotation.

As a result of this change in the Revenue Act of 1924, the income of revocable trusts, which had for years been taxed to the beneficiaries, was made taxable for the year

1924 and subsequent years to the grantor. Congress thus assumed authority to tax income of a revocable trust to either one of two persons, the grantor or the beneficiary. With due appreciation of the importance of the income tax and the value of its contribution to national revenue, it is submitted that its importance does not transcend in importance the observance of long settled principles of trust law and well defined constitutional limitations.

POINT I.

The trust indenture of December 29, 1922, vested the legal title to the corpus of the trust in the trustee and the equitable title in the beneficiary, and the income from the corpus was the income of the beneficiary.

Under the trust deed of December 29, 1922, the trustee became vested with legal ownership of the trust principal and the beneficiary became vested with the equitable ownership thereof. Until the exercise of the power of revocation reserved by the grantor, the transfer, so far as material here, was as complete and effective when made as though the trust had been irrevocable.

This has been clearly recognized by this Court. In *Jones v. Clifton*, 101 U. S. 225, it was said (p. 229):

> "The powers of revocation and appointment to other uses reserved to the husband in the deeds in question do not impair their validity or their efficiency in transferring the estate to the wife to be held by her until such revocation or appointment be made."

In that case the conveyance was directly to the wife of the settlor, who reserved the power of revocation. After the settlor had become insolvent, his assignee in bankruptcy sought to set aside the deed or to exercise the power of

revocation reserved therein. In denying the assignee the rights asserted this Court said (p. 230):

> "The title to the land and policies passed by the deeds; a power only was reserved. That power is not an interest in the property which can be transferred to another, or sold on execution, or devised by will. The grantor could, indeed, exercise the power either by deed or will, but he could not vest the power in any other person to be thus executed. Nor is the power a chose in action. It did not, therefore, in our judgment, constitute assets of the bankrupt which passed to his assignee."

Both the Federal Circuit Court for the Second Circuit and the Court of Appeals of the State of New York have recognized that, until revoked, a revocable trust, under New York law, creates an estate as valid and effective as if the trust had been irrevocable. In the recent case of *The Farmers' Loan & Trust Company* v. *Bowers*, 29 Fed. (2d) 14 (C. C. A., 2d Circ.), Circuit Judge Manton said (p. 17):

> "A power to revoke is not a property right nor an interest in property. *Jones* v. *Clifton*, 101 U. S. 225; *Hill* v. *Nichols*, 18 Fed. (2d) 139; *Reinecke* v. *Northern Trust Co.*, 24 Fed. (2d) 91; *In re Dolan's Estate*, 279 Pa. 582; *Stone* v. *Hackett*, 12 Gray (Mass.) 227. The power of revocation is perfectly consistent with the creation of a valid trust. Title passes to the donee and remains vested for the purpose of the trust even though there be a right to revoke it. The power to revoke is not evidence of an intent to postpone the legal enjoyment, existence or effect of that which may perhaps thereafter be brought to an end for the reason that the enjoyment and possession actually passes to the beneficiaries. Until the right to revoke is exercised an estate exists by virtue of the transfer. *People* v. *Northern Trust Co.*, 289 Ill., 475; *In re Dolan's Estate, supra.* Such a power is not transferrable or descendible nor may it be alienated or passed by a will. It is personal to the holder. *Lewellyn* v. *Frick*, 268 U. S. 238; *Jones* v. *Clifton, supra; Reinecke* v. *Northern Trust Co., supra.*

When in May, 1916, the settlor made his indenture, he transferred his title and also all possession and enjoyment. His reserved powers were not conditions of the vesting of the estate, but merely conditional limitations. Such has been the rule under the transfer tax in New York State referring to a transfer intending to take effect in possession and enjoyment at or after death. *Matter of Miller,* 236 N. Y. 290; *Matter of Carnegie,* 203 App. Div. 91, affd. 236 N. Y. 517."

In the leading New York case of *Van Cott* v. *Prentice,* 104 N. Y. 45, 52, 55, Judge Finch said:

"Neither the power of revocation nor the provisions determining the trust in the event of a legal interference, or the death of the trustee in the life of the settlor, are in the least inconsistent with the trust as completely and perfectly constituted. They both assume its separate and effective existence and provide merely for its termination upon the happening of specified contingent events. * * * We discover nothing in the provisions of the deed, properly construed, inconsistent with a completely constituted trust, wholly voluntary and benevolent, and subject to revocation by the settlor at any moment; a kind of trust of which the books furnish many instances, and which, indeed, are sometimes subject to doubt and suspicion if the power of revocation is absent."*

Both Judge Mack of the District Court for the Southern District of New York and Judge Manton of the Circuit Court

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* In addition to the cases above referred to and the citations included in the quotations, to the same effect see:

Von Hesse v. *MacKaye,* 136 N. Y. 114, 32 N. E. 615;
Schreyer v. *Schreyer,* 101 App. Div. 456 (affd., 182 N. Y. 555);
Nichols v. *Emery,* 109 Cal. 323, 41 Pac. 1089;
Hellman v. *McWilliams,* 70 Cal. 449, 11 Pac. 659;
Dickerson's Appeal, 115 Pa. 198, 8 Atl. 64;
Stone v. *Hackett,* (Mass.) 12 Gray 227.

of Appeals for the Second Circuit have recognized this contention in their opinions. Judge Mack said (R., fol. 43):

> "The creation of a revocable trust vests in the beneficiary a present estate in all respects valid until the power of revocation is exercised. *Jones* v. *Clifton*, 101 U. S. 225; *Van Cott* v. *Prentice*, 104 N. Y. 45."

Judge Manton makes a like observation at Record, fol. 57.

The cases of *Reinecke* v. *Northern Trust Company*, 278 U. S. 339, and *Chase National Bank* v. *United States*, 278 U. S. 327, are not in conflict with this position. The most that those cases can be said to hold is that where the grantor of a trust or the insured under a life insurance policy reserves the right to revoke the trust or change the beneficiary of the insurance policy, the termination of that power at death causes a shifting of "economic benefits" which is the legitimate subject of the *excise tax* imposed by the federal estate tax law. Indeed, in the *Chase Bank* case it is stated (p. 338):

> "Termination of the power of control at the time of death inures to the benefit of him *who owns the property* subject to the power." (Italics supplied.)

On the argument of this case in the Courts below counsel for the Government placed considerable reliance upon Section 145 of Chap. 50 of the Consolidated Laws of New York (Real Property Law)* in support of the proposition that the grantor of a revocable trust is both technically and in substance the owner of the trust principal during the time the trust remains in existence. Appellant submits that this statute has no bearing on the present issues. Under the express limitation of the statute it is effective only with

* "Section 145. *Effect of power to revoke.* Where the grantor in a conveyance reserves to himself for his own benefit, an absolute power of revocation, he is to be still deemed the absolute owner of the estate conveyed, *so far as rights of creditors and purchasers are concerned.*" (Italics ours.)

respect to creditors of and purchasers from the transferor. As to creditors, the specialized statutory law which has been evolved for their protection is not to be construed as prescribing general principles applicable to cases where rights of creditors are not involved. As to purchasers from the transferor who reserves a power of revocation, assuming that such purchasers acquire good title in the absence of an express revocation, this is no more than logical since by the very act of transferring the property to such third parties the transferor exercises an implied and, indeed, a very practical revocation of his prior conveyance. For these reasons, it is submitted that the effect of the statute is not to change the well established law represented by *Van Cott* v. *Prentice, supra, Von Hesse* v. *MacKaye, supra,* and *Schreyer* v. *Schreyer, supra.*

Furthermore, there is grave doubt as to whether Section 145 applies to personal property at all. The cases which the Government heretofore has largely relied upon to support the proposition that it does relate to personalty (*Hutton* v. *Benkard,* 92 N. Y., 295; *Matter of Cooksey,* 182 N. Y., 92, 97; *Matter of Moehring,* 154 N. Y., 423, 427) arose under the New York Revised Statutes and prior to the adoption of the Consolidated Laws. Under the Revised Statutes, as stated in *Hutton* v. *Benkard, supra,* (p. 305):

> "It is provided that 'powers as they now exist by law are abolished, and from the time this chapter shall be in force the creation, construction and execution of powers shall be governed by the provisions of this article.' (3 R. S. [7th ed.] 2188, Sec. 73.) This language is very broad; broad enough to include all powers, both as to real and personal property."

Section 130 of the Real Property Law, however, now provides:

> "Sec. 130. *Effect of Article.* Powers, as they existed by law on the thirty-first day of December, eighteen hundred and twenty-nine, are abolished. Hereafter the creation, construction and execution of powers, *affecting*

real property, shall be subject to the provisions of this article; but this article does not extend to a simple power of attorney to convey real property in the name and for the benefit of the owner." (Italics ours.)

The article referred to is Article V, in which Section 145 is found.

We call attention particularly to the *new* words "affecting real property" contained in the current statute. This phrase, new in the Consolidated Laws, clearly appears to limit the general application of Article V of the Real Property Law to real property. If this is true, then Section 145 is irrelevant.

Since, in the instant case, legal title to the principal of the trust was at all times in the trustee and not in the donor and equitable title was in the beneficiary, the income taxed, in the words of District Judge Mack, "arose from property equitably owned for life by the beneficiary; this income came immediately into her possession through the hands of the trustee." (R., fol. 43) The case therefore does not present the situation of a present assignment of the right to receive future income where the title to the principal is at all times in the donor, such as *Bing* v. *Bowers,* 26 Fed. (2d) 1017 (C. C. A., 2d. Circ.) and *Mitchel* v. *Bowers,* 15 Fed. (2d) 287 (C. C. A., 2d Circ.). Rather it is a case where, by reason of the questioned statute, "A" has been taxed on income received by "B" which was derived from property the legal title to which was at all times while the income accrued in "C" and the equitable title in "B". "A" has been taxed on income which, in fact, he never received and which arose from property title to which was vested in another.

For the reasons above stated it is submitted that the reservation of the power of revocation does not create such a relationship between the donor and the principal of the trust as to permit this Court to consider that the income taxed arose from property owned by the donor. This case, therefore, does not present a situation involving principles analogous to those of constructive receipt.

Even if it be conceded that the existence of the power of revocation does enable the donor to exert a very real influence over the principal of the trust, it is believed that the existence of this power and its potentialities are immaterial. The taxing statute is concerned with income, not with principal. Regardless of the nature and extent of the powers of repossession and control which the settlor reserved over the principal of the trust, the income, once accrued, was completely and irrevocably the beneficiary's income, in which the settlor had no interest and over which he had no control. (N. Y. Surrogate's Court Act, Sec. 204.) This income was subject to the claims of the creditors of the beneficiary. (N. Y. Consol. Laws, Ch. 50, § 98.*) In this respect, therefore, revocable and irrevocable trusts are indistinguishable. The donor of a revocable trust has no greater interest in the distributable income of the corpus from the moment such income accrues than has the donor of an irrevocable trust.

There would seem to be little question that the income from an irrevocable trust cannot constitutionally be taxed to the donor, and the power of control which the donor of a revocable trust has over the principal is the only thing which the Government can possibly seize upon for justifying its action. Since the power of revocation with respect to the principal is immaterial, in view of the fact that the tax is a direct tax on income and is not affected by practical powers which may be exerted over the principal from which that income arose, appellant contends that the main ground on which the tax is sought to be justified completely fails. If it would be unconstitutional to tax the income of an irrevocable trust to the donor when he is not the recipient thereof, it is submitted that the present statute is unconstitutional.

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*The rule laid down by this statute has been extended by judicial construction to trusts of personalty as well as trusts of real estate. See *Brearley School* v. *Ward,* 201 N. Y. 358, 94 N. E. 1001; *Wetmore* v. *Wetmore,* 149 N. Y. 520, 44 N. E. 169; *Mills* v. *Husson,* 140 N. Y. 99, 35 N. E. 422.

This Court has already decided (*Irwin* v. *Gavit*, 268 U. S. 161) that the beneficiary of a trust is the owner of the income from the trust to such an extent that he may be subject to an income tax thereon. Appellant submits that, as a fundamental proposition, two people cannot each have such an interest in the same income that Congress, at its option, can levy an income tax against either on account of such income. If this be true, the established taxability of trust income to the recipient beneficiary precludes its taxability to the donor.

POINT II.

Congress cannot, by mere edict, declare that income actually received by the beneficiary shall be treated as the income of the creator of the trust.

As shown above, the beneficiary, Mrs. Corliss, was at all times, in every conceivable sense, the owner of and entitled to all the beneficial interest in and economic benefit of the income taxed. The right reserved by the donor was simply and solely the right to reacquire title to the principal of the trust fund, a right which was not exercised and which in the event of exercise would not have reached any income then accrued and held by the trustee. Therefore, the effect of the instant statute, baldly stated, is to declare that income of "A" shall be considered the income of "B". For the reasons above indicated, it is submitted that what counsel for the Government in the lower Courts called the *"nexus"* between "A" and "B" in the case of a revocable trust is immaterial because that *"nexus"* relates only to the principal and not to the income, with which alone the statute is concerned. Hence, the same principles are believed applicable which would apply if the donor and beneficiary had been total strangers or, in any event, if this had been an irrevocable trust instead of a revocable trust.

It is submitted that Congress has no power under these circumstances to declare that the income of Mrs. Corliss for purposes of income taxation shall be considered the income of Mr. Corliss. As the late Justice Moody said, in *Home Savings Bank* v. *City of Des Moines,* 205 U. S. 503, 511:

> "With respect to taxation, usually, if not necessarily, property and its owners are inseparable. Taxes are assessed against persons upon the property which they own, not upon property which others own."

The Sixteenth Amendment to the Constitution of the United States provides that Congress shall have power to lay and collect taxes on income from whatever sources derived, without apportionment among the several States, and without regard to any census or enumeration. This Court said in *Eisner* v. *Macomber,* 252 U. S. 189, at page 206:

> "As repeatedly held, this did not extend the taxing power to new subjects, but merely removed the necessity which otherwise might exist for an apportionment among the States of taxes laid on income."

And continuing, said:

> "In order, therefore, that the clauses cited from Article I of the Constitution may have proper force and effect, save only as modified by the Amendment, and that the latter also may have proper effect, it becomes essential to distinguish between what is and what is not 'income', as the term is there used; and to apply the distinction, as cases arise, according to truth and substance, without regard to form. *Congress cannot by any definition it may adopt conclude the matter, since it cannot by legislation alter the Constitution, from which alone it derives its power to legislate, and, within whose limitations alone that power can be lawfully exercised."* (Italics ours)

The Court, in the *Macomber* case, defined "income" in the following language:

> "*'Derived—from — capital'; — 'the gain—derived—from capital,' etc.* Here we have the essential matter;

not a gain *accruing to* capital, not a *growth* or *increment* of value *in* the investment; but a gain, a profit, something of exchangeable value *proceeding from* the property, *severed from* the capital however invested or employed, and *coming in*, being *'derived,'* that is, *received* or *drawn* by the recipient (the taxpayer) for his *separate* use, benefit and disposal;—*that* is income derived from property. Nothing else answers the description." (The italics are the Court's.)

In the *Macomber* case, the Supreme Court had before it the provision of the Revenue Act of 1916, which provided that there should be included in the term "dividends" any stock dividends, and expressly declaring that stock dividends should be considered income to the amount of their cash value. The Court held that Congress could not by any such definition declare to be income that which was in fact not income; that it could not by legislation alter the constitution "from which alone it derives its power to legislate." If Congress cannot declare to be income what is not in fact income, clearly it cannot declare to be the income of Mr. Corliss the income from securities, the legal title to which was not vested in him, and when in fact another person was entitled to and actually received such income. Such action on the part of Congress as to plaintiff is an act of confiscation in direct violation of the Fifth Amendment to the Constitution.

This Court, in the *Macomber* case, pointed out that Congress cannot disregard or ignore the substantial difference between the corporation and its stockholders and treat the corporate organization as unreal, or look upon the stockholders as partners when they are not partners. And yet, in the instant case, Congress has undertaken to ignore the very substantial difference between the income of Mr. Corliss and the income of Mrs. Corliss and has attempted to treat the receipt of income by Mrs. Corliss as not received by her but as in fact received by Mr. Corliss. If Congress cannot, in the exercise of its taxing powers, disregard the difference between the corporation and its stockholders, *a fortiori* it

cannot disregard the difference between Mr. Corliss' income and the income of Mrs. Corliss.

In the opinion of Solicitor Mapes (*supra*) where he had before him a trust indenture containing a power of revocation, and under which the settlor was the beneficiary of a part of the trust income, he said:

> "The trust being valid and passing a present right and title to the property, it cannot be held, under the facts presented, that the income arising therefrom belonged during his life to A, other than that amount which went to him as a beneficiary. Otherwise, the statute would impose an income tax upon income which was not received by the taxpayer. It would tax one person upon income 'received or drawn by the recipient'. (*Eisner* v. *Macomber*, 252 U. S. 189.) The income from this trust was not received or drawn by the creator of the trust, except such amounts as he received as a beneficiary. It was received by the beneficiaries, who were the only persons entitled to receive it while the trust remained in existence."

We find nothing in the recent decisions of this Court in *Taft* v. *Bowers*, 278 U. S. 470, and *United States* v. *Robbins*, 269 U. S. 315, inconsistent with this position.

In the *Taft* case this Court held that where property appreciated in value and then was given to another, Congress could follow such appreciation into the hands of the donee and tax him on the full amount thereof when the property was sold. In other words, this Court approved a statute which permitted the levying of a tax upon the party who received the income. The appreciation in the hands of the donor was not income within the meaning of the Sixteenth Amendment (*Eisner* v. *Macomber*, *supra*). "Income" was received only when the property was sold, and when the property was sold the party who received such income was the party taxed. This fact obviously was considered of great importance by the Court in view of its observation (p. 482):

> "In truth the stock represented only a single investment of capital—that made by the donor. And when

through sale or conversion the increase was separated therefrom, it became income from that investment *in the hands of the recipient* subject to taxation according to the very words of the Sixteenth Amendment. By requiring *the recipient of the entire increase* to pay a part into the public treasury, Congress deprived her of no right and subjected her to no hardship. She accepted the gift with knowledge of the statute and, as to the property received, voluntarily assumed the position of her donor. When she sold the stock *she actually got the original sum invested, plus the entire appreciation;* and out of the latter only was she called on to pay the tax demanded." (Italics ours.)

It is submitted that this is a totally different thing from permitting Congress to tax "A" upon the income of "B", which involves the constitutionality of taxing one who as a matter of fact did *not* receive the income taxed.

In the *Robbins* case the decision was that a husband could be taxed on the full amount of income received from property held jointly by husband and wife under the community property law of California. How clearly distinguishable that case is from the present proceeding is indicated by the analysis of the *Robbins* case as contained in a report of the Attorney General to the Secretary of the Treasury, dated June 24, 1925, quoted in the footnote below.*

It is interesting in this connection to note that Circuit Judge Anderson of the First Circuit in the case of *Hamilton*

*"In the *Robbins* case, consideration of the statutes and decisions in California, in an effort to analyze the substantial nature of the wife's interest in the community property, disclosed that during the existence of the community the husband had the right to complete dominion, possession, and control of the community property; that it was at all times liable for the husband's debts, both those created before his marriage and his separate debts after his marriage; *that he might expend the community property and community income as he pleased without accountability to the wife;* that the only restrictions (prior to 1917) on the husband's complete dominion were that he might not, without her consent, give away community property or dispose of household furniture or her wearing apparel; that the wife had no right to

v. *Commissioner*, 24 Fed. (2d) 668, in speaking of the *Robbins* case, says (p. 671):

> "* * * in which (case) the Supreme Court held that, under the community property law of California, *the wife had only an expectancy in the income* of the ganancial partnership * * *" (Italics ours).

On the basis of the authorities above discussed, it is respectfully submitted that the power of Congress to impose an income tax as granted in the Sixteenth Amendment is limited to the power to tax the recipient of the income, and that Congress cannot by mere edict declare that income of Mrs. Corliss shall be considered the income of Mr. Corliss for purposes of income taxation.

POINT III.

The Statute is so unreasonable and arbitrary as to be unconstitutional under the limitations of the Fifth Amendment.

This Court on a number of occasions has held that a federal taxing statute may be unconstitutional when it reaches a certain degree of unreasonableness and arbitrariness.

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have a share in the community estate expended for her benefit; that her right to maintenance and support was not based on the theory that one-half of the community estate belonged to her, but on a marital obligation of the husband arising out of the marriage relation; that the wife could not maintain any action during the existence of the community with respect to the community property; and was not a proper party to a suit involving the community property; that prior to 1923, on dissolution of the community, the wife had no right to make testamentary disposition of any part of the community estate; that if the husband died first the wife succeeded to half of what then remained of the community property after paying the husband's debts, including debts incurred by him before marriage as well as those in connection with his separate estate; that under an unbroken line

Nichols v. *Coolidge,* 274 U. S. 531;
Brushaber v. *Union Pacific Railroad Company,* 240 U. S. 71;
Blodgett v. *Holden,* 275 U. S. 142;
Barclay & Co. v. *Edwards,* 267 U. S. 442, 445;
Schwab v. *Doyle,* 258 U. S. 529;
Llewellyn v. *Frick,* 268 U. S. 238;
Untermyer v. *Anderson,* 276 U. S. 440.

Concededly, in the absence of the statute which is being attacked the income from the revocable trust would have been taxed to Mrs. Corliss. Congress considered it necessary to change this rule in order to prevent the evasion of surtaxes. (See Vol. I of House Reports, Sixty-Eighth Congress, First Session, dealing with H. R. 6715 [1924 Revenue Act] page 21; Vol. I of Senate Reports of same Congress and Session, page 25; Vol. IV of House Reports of same Congress and Session, pages 19-20.)

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of decisions in California the widow took as an heir and by succession; that the community estate was liable for the debts of the wife contracted prior to the marriage, the liability being based on the common law rule that on marriage the husband became liable for all the debts contracted by his wife *dum sola,* and in California the statute having exempted the husband's separate estate from debts of the wife contracted before marriage left only the community estate subject to them; that the community property was not subject to the separate debts of the wife contracted after marriage; and that in many other respects the wife in California had none of the rights in the community property ordinarily connected with ownership of property.

"It was shown that, whatever adjectives or descriptive terms may be used in an attempt to define the nature of the wife's interest, when it came to the ordinary rights of ownership they were completely wanting, and the alleged ownership of the wife in a share of the community estate in California was properly described as a 'barren ideality'.

"All these considerations were advanced in the Robbins case, and, while not dealt with at length in the opinion, no doubt form the basis for the conclusion reached." (Italics ours.)

Appellant denies that the motives actuating donors of revocable trusts in setting up such trusts are of any materiality in determining the constitutional questions involved. A taxpayer has the right to arrange his affairs and to carry on his business in such a way as to reduce his taxes to a minimum, thus legally avoiding taxes which otherwise might have been payable.

Bullen v. *Wisconsin*, 240 U. S. 625, 630;
U. S. v. *Isham*, 17 Wall. 496;
Fraser v. *Nauts*, 8 Fed. (2d) 106 (D. C., N. D. Ohio, W. D.);
Weeks v. *Sibley*, 269 Fed. 155 (D. C., N. D. Texas);
Walsh v. *Commissioner*, 18 B. T. A. 571.

But considering the bare actuality that the statute was passed because some taxpayers already had, and others might, resort to this means of cutting down surtaxes, it is submitted that the means adopted by Congress to prevent this result was arbitrary and unreasonable. Thousands of revocable trusts, in existence at the time the statute was passed, had been created before the enactment of the first income tax law in 1913, to meet a multitude of varying conditions. Still further thousands of such trusts must have been created after the inauguration of the surtax provisions of the income tax laws and before the enactment of the statutes involved here, for perfectly valid and bona fide purposes and without advertence to income tax considerations. It is by no means an unjustified assumption that even after the passage of § 219 of the 1924 Act many revocable trusts were created without any thought of the income tax. In spite of this situation, Congress concluded: "Since the device of the revocable trust may be used by some individuals for the purpose of evading surtaxes, despite the fact that there are an infinite variety of other circumstances which induce the creation of such trusts, we shall penalize all creators of revocable trusts and we shall conclusively 'presume' that all of such trusts were and would be created for the purpose of evading surtaxes."

Congress might have said that trust indentures containing the right of revocation shall be deemed to be presumptively fraudulent, or shall be deemed to be presumptively an attempt at evasion by the taxpayer, and thereby have shifted the burden of establishing good faith and freedom from evasion to the creator of the trust. But it did not. It treated all revocable trusts alike and took the position that regardless of how many revocable trusts, or how few, were created for the purpose of evading surtaxes, and regardless of whether or not there were any normal or surtaxes to be evaded, and regardless of whether or not any of such trusts were bona fide, it would assume that all donors of such trusts were and would be guilty of an attempt at evasion and it would not afford them an opportunity to prove that they were not.

With all due respect to the judgment of Congress in such matters, it is vigorously maintained that in this particular case its action is grossly arbitrary and unreasonable. Revocable trusts have not come into existence since the passage of the income tax laws. They have been recognized, valid instruments for many years and their very number is a graphic attestation to their utility under existing conditions. To be *suspicious* that all of them were and would be created for the purpose of evading surtaxes is unwarranted. To be *suspicious* that some of them have been used for the purpose is, we believe, justified. But *to assume conclusively* that all were and would be created with this purpose in view is so absurd as to render such words as "arbitrary", "unreasonable", and "capricious" wholly inadequate.

The case of *Schlesinger* v. *Wisconsin,* 270 U. S. 230, wherein this Court held that a state statute which conclusively "presumed" that all gifts made within six years prior to death were made in contemplation of death was unconstitutional, seems directly in point, and its pertinency is so obvious as to require no elaboration.

Perhaps it may be said in answer to this argument that the question of evading surtaxes is incidental and the vital factor is that since the donor could have acquired the income for himself, it is reasonable to tax him thereon. The ready

answer to such a contention is that whether or not the donor *could have done so,* the fact is, he did not, and to levy taxes on the basis of what people might have done is, to say the least, such an unsound theory of taxation that it should be promptly and firmly discouraged. The United States Board of Tax Appeals in *Appeal of Anna M. Harkness,* 1 B. T. A. 127, recognized this when it said (p. 130):

> "It seems to us to be fundamentally unsound to determine income tax liability by what might have taken place rather than by what actually occurred."

Surely counsel for the Government cannot maintain that, assuming the statute were not necessary to prevent avoidance of surtaxes, nevertheless, the tax would be reasonable because of what a taxpayer might have done but did not do.

POINT IV.

The taxation of the appellant upon the income of the trust beneficiary, cannot be justified as necessary to the enforcement of the admitted constitutional power to tax income.

If we correctly construe the opinions of the Courts below, their decisions rest upon the theory that the statutory provisions in question are necessary to prevent the evasion of surtaxes and may therefore be sustained under an implied power of Congress to do whatever is essential to make effective the authority contained in the Sixteenth Amendment to the Constitution.

Appellant vigorously denies that any such doctrine of "necessity" can render constitutional an otherwise unconstitutional statute. In *Schlesinger* v. *Wisconsin, supra,* this Court stated, relative to just such an argument of the purifying effect of necessity (p. 240):

> "The presumption and consequent taxation are defended upon the theory that, exercising judgment and

discretion, the legislature found them necessary in order to prevent evasion of inheritance taxes. That is to say, 'A' may be required to submit to an enactment forbidden by the Constitution if this seems necessary in order to enable the State readily to collect lawful charges against 'B'. Rights guaranteed by the federal Constitution are not to be so lightly treated; *they are superior to this supposed necessity.* The State is forbidden to deny due process of law or the equal protection of the laws for any purpose whatsoever." (Italics ours.)

In the more recent case of *Nichols* v. *Coolidge,* 274 U. S. 531 (at page 542) this Court has implied, wholly by way of dictum, that the taxation of gifts made in contemplation of death is dependent upon some such doctrine of ancillary power denied in *Schlesinger* v. *Wisconsin, supra,* but even in the *Nichols* case this Court was careful to note that "the right is limited by the necessity".

Admitting, therefore, but merely for the purposes of argument, that Congress does have the right to exert what would otherwise be unconstitutional powers in order to render effective the constitutional power to tax incomes, as limited by the language of this Court in *Nichols* v. *Coolidge, supra,* the exercise of such a power is unjustified in the situation presently involved.

Concededly, the trustee of the trust created by the appellant derived income within the meaning of the Sixteenth Amendment to the Constitution. It is equally clear that such income was received by Mrs. Corliss and can be taxed to her as such. (*Irwin* v. *Gavit,* 268 U. S. 161.) That case does not furnish the remotest authority, however, for the proposal to tax an individual upon income which he does not receive. On the contrary, *Irwin* v. *Gavit* clearly holds that income, as defined in the Sixteenth Amendment, can be taxed to the beneficiary of a trust who receives the same. Such income, being thus taxable, appellant submits that there is no "necessity" for Congress to invoke any ancillary constitutional power in this case.

None of the income of a revocable trust escaped tax prior to the enactment of the Revenue Act of 1924. There is no

occasion to speculate as to the power of Congress to tax one individual upon the income of another where the latter, by reason of other constitutional limitations, cannot be taxed upon the same. In the present case, the entire net income of the trust can clearly be taxed to the beneficiary, as it was taxed prior to the enactment of the 1924 Revenue Act. Congress is thus not put to the "necessity" of shifting the burden of the tax to some one who did not receive the income in order to collect a tax. "Necessity", as applied to the Sixteenth Amendment, cannot be construed other than as necessary in order to permit a tax to be collected upon "income from whatever source derived". As above indicated, no such necessity is involved in the instant case, and the mere preference of Congress, however laudable in purpose, to exact the highest rate of tax upon income, cannot justify the invocation of such ancillary constitutional power as Congress may have.

In this connection, the attention of the Court is again invited to its opinion in *Taft* v. *Bowers, supra.* There this Court said (pp. 482-483):

> "The provision of the statute under consideration seems entirely appropriate for enforcing a general scheme of lawful taxation. *To accept the view urged in behalf of petitioner undoubtedly would defeat, to some extent, the purpose of Congress to take part of all gain derived from capital investments. To prevent that result* and insure enforcement of its proper policy, *Congress had power* to require that for purposes of taxation the donee should accept the position of the donor in respect of the thing received. And in so doing, it acted neither unreasonably nor arbitrarily." (Italics ours.)

The clear inference from this language is that if the statute had not been necessary to enable Congress "to take part of all gain derived from capital investments", Congress would have acted "unreasonably" and "arbitrarily" in passing the statute. If this be true, thence since it is not necessary for Congress to tax the income of a revocable trust to the donor in order "to take part of all gain" derived from

the trust investments, inasmuch as the beneficiary would be taxable thereon under the decision of *Irwin* v. *Gavit, supra,* the present statute is unreasonable and arbitrary, and, therefore, unconstitutional.

It is submitted that Congress, by taxing to the donor income which, as a stark reality, he never received, and income which he had no right whatever to receive, has adopted a theory of taxation entirely inconsistent with the Sixteenth Amendment and in direct violation of the Fifth Amendment, and that the mere desire of Congress to concentrate incomes in such a manner as to yield a maximum *rate of tax* does not create a "necessity" justifying the disregard of accepted principles of constitutional and trust law

POINT V.

The statutory provisions in question are in any event unconstitutional as applied to the income of revocable trusts created prior to June 2, 1924, the effective date of the Revenue Act of 1924.

Even if this Court should consider that the statutory provisions under review are a valid exercise of an ancillary constitutional power, and are not arbitrary and unreasonable as applied to revocable trusts created since their enactment, we submit that they should be held unconstitutional as applied to trusts created prior to the enactment of the Revenue Act of 1924:

Nichols v. *Coolidge, supra;*
Blodgett v. *Holden, supra;*
Brewster v. *Gage,* 50 Sup. Ct. 115;
The Farmers' Loan and Trust Company v. *Bowers, supra;*
Brushaber v. *Union Pacific Railroad Company,* 240 U. S. 1, 20;
Barclay & Co. v. *Edwards,* 267 U. S. 442, 450.

Stated otherwise, what may be reasonable as applied to the income of trusts created after the effective date of the statute may be arbitrary and unreasonable as applied to the income of trusts created prior thereto, or, in any event, to such trust income as accrued prior to the effective date.

This Court obviously was influenced in its determination that the statute involved in the case of *Taft* v. *Bowers, supra*, was reasonable by the consideration that the donee "accepted the gift with knowledge of the statute and, as to the property received, voluntarily assumed the position of her donor" (see p. 482). In other words, the statute was considered reasonable because of its prospective operation and the fact that the act of giving was performed with a knowledge of the consequences. Such considerations are wholly inapplicable to the case of a revocable trust created prior to the enactment of Sections 219 (g) and (h) of the Revenue Act of 1924. In the instant case the donor did not make the gift "with knowledge of the statute" and therefore cannot be said to have acted with full knowledge of the consequences.

While the trust here involved was created in 1922, numerous trusts which will be affected by this Court's decision were created years prior to the inception of the present system of surtaxes, and have at no time since been modified or revoked. It is impossible to contend that such trusts were created for the purpose of evading surtaxes, and it is unreasonable, we submit, to penalize the donors of such trusts because of motives actuating others in the creation of revocable trusts.

For these reasons it is submitted that whether or not the application of the statutory provisions in question are arbitrary and capricious as applied to the income of revocable trust estates created subsequent to June 2, 1924, in any event such statutory provisions are arbitrary and capricious as applied to the income of estates created prior to that date and, as to such trusts, should not be sustained.

POINT VI.

The judgments of the District Court and of the Circuit Court of Appeals should be reversed, the motion to dismiss the complaint denied and judgment directed for the appellant as prayed for in the complaint.

Respectfully submitted,

JOSEPH M. HARTFIELD,
Counsel for Appellant.

RUSSELL D. MORRILL,
A. C. NEWLIN,
Of Counsel.

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Supreme Court of the United States,

OCTOBER TERM, 1929.

No. 344.

CHARLES A. CORLISS,
Plaintiff-Appellant.

against

FRANK K. BOWERS, AS COLLECTOR OF INTERNAL REVENUE FOR THE SECOND DISTRICT OF NEW YORK,
Defendant-Respondent.

REPLY BRIEF FOR APPELLANT.

JOSEPH M. HARTFIELD,
Counsel for Appellant.

RUSSELL D. MORRILL,
A. C. NEWLIN,
Of Counsel.

The Evening Post Job Printing Office, Inc., 154 Fulton St., New York, N. Y.

Supreme Court of the United States

OCTOBER TERM, 1929

No. 344

CHARLES A. CORLISS,
Plaintiff-Appellant

against

FRANK K. BOWERS, as Collector of Internal Revenue for the Second District of New York,
Defendant-Respondent

REPLY BRIEF FOR APPELLANT.

The argument of the Respondent is based largely upon the theory that "up to the very moment when each individual payment of income was made to petitioner's wife the gift to her was incomplete; it was not beyond the control of petitioner until she actually received it." (Respondent's Brief, pp. 10-11.) Respondent cites no direct authority for this proposition. Appellant contends that it is not the law.

According to Respondent's contention, if income is received by the trustee of a revocable trust and, before being paid over to the beneficiary, the trust is completely revoked, such accumulated income goes to the donor even though he is not the beneficiary. The consequences of such a proposition are startling. If such a trust deed made no provision for time of payment and the trustee, for one reason or another, failed to make payment currently as such income was received, such action on the part of the trustee would

determine the respective rights of the donor and beneficiary to the income. Needless to say, the trustee has no such power. Dates of payment are fixed merely as a matter of administrative convenience. It cannot be doubted that they are not in the least effective in fixing the respective rights of the parties.

The terms of the revocation clause of the trust indenture here involved (R., 12-13) are not broad enough to reach income received by the trustee or accrued and not paid over to the beneficiary at the time of revocation. The power of the donor to retake is limited to the "trust fund". No mention is made of distributable income. To construe the term "trust fund" as including accumulated but undistributed income would make the trust illegal in New York since it would then be in conflict with the statute against accumulations. (Consolidated Laws, Ch. 41, Sec. 16. (Personal Property Law)*) Under paragraph First of the trust indenture (R., 9) distributions of income were to be made quarterly. Therefore, the trust deed in effect would permit accumula-

* § 16. *Validity of directions for accumulation of income.* An accumulation of the income of personal property, directed by any instrument sufficient in law to pass such property is valid:

1. If directed to commence from the date of the instrument, or the death of the person executing the same, and to be made for the benefit of one or more minors, then in being, or in being at such death, and to terminate at or before the expiration of their minority.

2. If directed to commence at any period subsequent to the date of the instrument or subsequent to the death of the person executing it, and directed to commence within the time allowed for the suspension of the absolute ownership of personal property, and at some time during the minority of the persons for whose benefit it is intended, and to terminate at or before the expiration of their minority.

3. All other directions for the accumulation of the income of personal property, not authorized by statute, are void. In either case mentioned in subdivisions one and two of this section a direction for any such accumulation for a longer term than the minority of the persons intended to be benefited thereby, has the same effect as if limited to the minority of such persons, and is void as respects the time beyond such minority. (Here follow irrelevant provisos.)

tions of at least two months and twenty-nine days, and hence would violate the above-mentioned statute. *Matter of Dexter,* 134 Misc. 195 (N. Y.), *Matter of Lamb,* 182 App. Div. 180, aff'd. 224 N. Y. 577. The trust instrument is not to be construed in such manner as to render it illegal when another construction, consistent with its validity, is clearly permissible. *Border National Bank* v. *American National Bank,* 282 Fed. 73 (C. C. A., 5th Circ.), certiorari denied 260 U. S. 701.

Not only was the beneficiary entitled to the income as it was received by the trustee, but her rights thereto became vested, without possibility of divestment, as such income accrued, under Section 204 of the New York Surrogate's Court Act.*

Respondent presumably relies on certain statements from the opinions of the Circuit Court and of the District Court for his contention that the beneficiary has no interest in the income until actually paid over. (See Respondent's Brief, pp. 7-8.) Such statements, however, clearly contemplate an amendment to the trust deed to the extent of making the donor the beneficiary. They are no authority for the position that the donor, when not a beneficiary, could take for himself income either accrued or received by the trustee

* 204. *Apportionment of rents, annuities and dividends.* All rents reserved on any lease made after June seventh, eighteen hundred and seventy-five, and all annuities, dividends and other payments of every description made payable or becoming due at fixed periods under any instrument executed after such date, or, being a last will and testament that takes effect after such date, shall be apportioned so that on the death of any person interested in such rents, annuities, dividends or other such payments, or in the estate or fund from or in respect to which the same issue or are derived, or on the determination by any other means of the interest of any such person, he, or his executors, administrators or assigns, shall be entitled to a proportion of such rents, annuities, dividends and other payments, according to the time which shall have elapsed from the commencement or last period of payment thereof, as the case may be, including the day of the death of such person, or of the determination of his or her interest, after making allowance and deductions on account of charges on such rents, annuities, dividends and other payments. Every such person or his executors,

but not paid over to the beneficiary. Indeed, the District Court was careful to note (R., 25) that "the trust property may of course by a proper instrument be sold by the settlor or the income therefrom transferred *before its accrual* to a third person, such acts being implied assertions of his unqualified right to repossession." (Italics ours.)

It is therefore submitted that the powers of the Appellant under the revocation clause of the trust indenture related only to the principal and not to the income of the trust, and that since this tax is concerned with income, the lower courts' decisions should be reversed.

Respondent cites *In re Mayo's Will,* 136 N. Y. Sup. 1066, as authority for the applicability of Section 145 of the Real Property Law of New York. (Respondent's Brief, p. 14) The cases relied upon by Surrogate Fowler in that decision as authority for his statement that powers connected with personal property are co-extensive with powers in the law of real property in New York, were all decided before the amendment to Section 130 of the Real Property Law in the Consolidation of 1909 (see Appellant's Brief, pp. 10-11) and the Surrogate made no reference to said Section 130 when making his pronouncement. It is submitted that the accuracy of such statement of the rule of law therefore may be questioned.

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administrators or assigns shall have the same remedies at law and in equity for recovering such apportioned parts of such rents, annuities, dividends and other payments, when the entire amount of which such apportioned parts form part, becomes due and payable and not before, as he or they would have had for recovering and obtaining such entire rents, annuities, dividends and other payments, if entitled thereto; but the persons liable to pay rents reserved by any lease or demise, or the real property comprised therein shall not be resorted to for such apportioned parts, but the entire rents of which such apportioned parts form parts, must be collected and recovered by the person or persons who, but for this section, or chapter five hundred and forty-two of the laws of eighteen hundred and seventy-five, would have been entitled to the entire rents; and such portions shall be recoverable from such person or persons by the parties entitled to the same under this section. This section shall not apply to any case in which it shall be expressly stipulated that no apportionment be made, or to any sums made payable in policies of insurance of any description.

Respondent cites *United States* v. *Robbins*, 269 U. S. 315 (Respondent's Brief, p. 12). That case has already been considered in Appellant's main brief (pp. 17-19). In this connection, the Court's attention is called to the decisions of the Circuit Court of Appeals for the Fifth Circuit in the cases of *Bender* v. *Pfaff* and *Hopkins* v. *Bacon*, decided February 28, 1930, wherein it was held that *United States* v. *Robbins* was not applicable under the Community Property Laws of the States of Louisiana and Texas, respectively, since under the laws of said states the interest of the wife in the community income was substantial. The District Court of the United States for the Western District of Washington in the case of *Seaborn* v. *Poe*, 32 Fed. (2d) 916, has reached a similar conclusion with respect to the Community Property Law of the State of Washington. The facts of these cases are much more analogous to the instant situation than the facts in *United States* v. *Robbins*.

The United States Circuit Court of Appeals for the Seventh Circuit on February 28, 1930 handed down an opinion in the case of *Maud Dunlap Shellabarger* v. *Commissioner*, which is very significant. Petitioner's father died testate and by his will created two trusts, the entire income from which was to be paid to his daughter Maud except for certain payments, including $100 a month to his daughter Georgia. Georgia, dissatisfied with the provisions of her father's will, notified the other beneficiaries of her intention to contest it. Negotiations between the sisters ensued, resulting in a written contract whereby, in consideration of Georgia's abandonment of her threatened contest of the will, Maud agreed to give her half of an outright legacy and, as received, to pay to her during her lifetime three-tenths of the net income of the trust and one-fifth to a bank as trustee for the use of Georgia's descendants. There was a provision for reversion to Maud in case of Georgia's death leaving no descendants and also for cancellation of the contract in case Georgia failed to abide by its terms. The Court held that Maud was not liable to tax on the income received by her sister Georgia

under the contract. In the course of its opinion the court said:

> "Income taxes look to the period for which they are imposed, and operate upon income accrued and paid to the taxpayer as income to the taxpayer within that period. That in some subsequent tax year conditions might come into existence under which Maud would again have for her own use a greater part, or even the whole, of the net income from the testamentary trusts, is wholly beside the question in determining her taxable income for the year 1924. In that year it appears that not only was Georgia and the bank lawfully entitled under the contract to demand and receive to their respective uses the half of the net income from these trusts, but they actually did so then receive it."

And Appellant submits that it is beside the point to argue on the basis of what he might have done during the year 1924 in the way of modifying the trust deed since, under the actual facts, from the moment any income accrued on the trust principal the beneficiary was lawfully entitled to such income for her individual use, and she actually did receive it.

Respectfully submitted,

JOSEPH M. HARTFIELD,
Counsel for Appellant.

RUSSELL D. MORRILL,
A. C. NEWLIN,
of Counsel.

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No. 344

In the Supreme Court of the United States

OCTOBER TERM, 1929

CHARLES A. CORLISS, PETITIONER

v.

FRANK K. BOWERS, AS COLLECTOR OF INTERNAL REVENUE FOR THE SECOND DISTRICT OF NEW YORK

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR RESPONDENT

In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR RESPONDENT

The respondent does not oppose the petition for certiorari.

This case involves the question of the constitutionality of subdivisions (g) and (h) of Section 219 of the Revenue Act of 1924, which taxes the income from revocable trusts to the settlor instead of to the beneficiary thereof.

The language of the statute (Revenue Act of 1924, c. 234, 43 Stat. 253, 277; U. S. C., Title 26, Sec. 960) is as follows:

> SEC. 219. (g) Where the grantor of a trust has, at any time during the taxable year,

either alone or in conjunction with any person not a beneficiary of the trust, the power to revest in himself title to any part of the corpus of the trust, then the income of such part of the trust for such taxable year shall be included in computing the net income of the grantor.

(h) Where any part of the income of a trust may, in the discretion of the grantor of the trust, either alone or in conjunction with any person not a beneficiary of the trust, be distributed to the grantor or be held or accumulated for future distribution to him, or where any part of the income of a trust is or may be applied to the payment of premiums upon policies of insurance on the life of the grantor (except policies of insurance irrevocably payable for the purposes and in the manner specified in paragraph (10) of subdivision (a) of section 214), such part of the income of the trust shall be included in computing the net income of the grantor.

Pursuant to this provision a tax, amounting to $44,687.43, with interest, was assessed against the petitioner, based upon income received by his wife in 1924 under a trust created by him in 1922, which he reserved the right to revoke at any time. The tax was paid under protest and this suit was brought for its recovery. Both the United States District Court for the Southern District of New York (Opinion, R. 40) and the Circuit Court of Appeals for the Second Circuit (Opinion, R. 55) upheld the constitutionality of the sections in the instant case, and so did the United States District Court for the

Western District of Pennsylvania in *Clapp* v. *Heiner* (not yet reported).

We know of no decision in conflict, and submit that respondent's contention is a proper extension of the principles enunciated in *Taft* v. *Bowers*, 278 U. S. 470, and *Reinecke* v. *Northern Trust Company*, 278 U. S. 339.

While we believe the case to have been correctly decided by the courts below, the precise question is one of first impression and of general importance; and as the case affects numerous revocable trusts now in existence, it would seem desirable that the question be settled by this Court.

The Government, therefore, does not oppose the issuing of the writ.

Respectfully submitted.

CHARLES E. HUGHES, Jr.,
Solicitor General.

RANDOLPH C. SHAW,
Special Assistant to the Attorney General.

F. W. DEWART,
Special Attorney,
Bureau of Internal Revenue.

SEPTEMBER, 1929.

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No. 344

In the Supreme Court of the United States

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FRANK K. BOWERS, AS COLLECTOR OF INTERNAL REVENUE FOR THE SECOND DISTRICT OF NEW YORK

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

OPINIONS BELOW

The opinion of the District Court (R. 22) is reported in 30 F. (2d) 135. The opinion of the Circuit Court of Appeals (R. 29) is reported in 34 F. (2d) 656.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on July 1, 1929. (R. 33.) Petition for certiorari to review the judgment was filed Au-

gust 27, 1929, and was granted October 21, 1929. (R. 34.) The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

The principal question is whether subdivisions (g) and (h) of Section 219 of the Revenue Act of 1924 are constitutional.

If so, the additional question is whether they are constitutional as applied to the income of a revocable trust created prior to the enactment of that Act.

STATUTE INVOLVED

The pertinent portions of the Revenue Act of 1924, c. 234, 43 Stat. 253, 277 (U. S. C., Title 26, Sec. 960), reads as follows:

> SEC. 219. * * *
>
> (g) Where the grantor of a trust has, at any time during the taxable year, either alone or in conjunction with any person not a beneficiary of the trust, the power to revest in himself title to any part of the corpus of the trust, then the income of such part of the trust for such taxable year shall be included in computing the net income of the grantor.
>
> (h) Where any part of the income of a trust may, in the discretion of the grantor of the trust, either alone or in conjunction with any person not a beneficiary of the trust, be distributed to the grantor or be held or accumulated for future distribution to him,

or where any part of the income of a trust is or may be applied to the payment of premiums upon policies of insurance on the life of the grantor (except policies of insurance irrevocably payable for the purposes and in the manner specified in paragraph (10) of subdivision (a) of Section 214), such part of the income of the trust shall be included in computing the net income of the grantor.

STATEMENT

On December 29, 1922, petitioner, in the County and State of New York, delivered a trust indenture to the trustee therein named, the Bankers Trust Company, of New York City, together with corporate stocks and securities listed in the schedule annexed to the indenture. (R. 3–4.) The trustee was directed to collect the income from the securities and pay it, after deducting commissions and expenses, to the petitioner's wife for the term of her life. (R. 9.) Upon her death the principal of the trust was to be paid in equal shares to the petitioner's children then living, and the issue of any deceased children, and in default thereof, to such persons as petitioner's wife might designate and appoint. (R. 9–10.)

By the second paragraph of the trust indenture petitioner reserved the right to instruct the trustee with respect to sales of the trust property and changes in the investment of the trust funds. (R. 10.) In the fifth paragraph the authority of the

trustee to deal with the stock and securities was set forth in detail and it was specified that in all these matters the trustee should act subject to the control and written directions of the petitioner. (R. 11–12.)

The seventh paragraph of the indenture provided as follows (R. 12–13):

> Notwithstanding anything to the contrary herein contained, the party of the first part may, from time to time, during the continuance of the trust, by instrument in writing executed and acknowledged in the manner required for a deed of real property so as to enable it to be recorded in the State of New York and delivered to the Trustee, modify or alter in any manner, or revoke in whole or in part, this indenture and the trusts then existing, and the estates and interests in property hereby created, and in case of such revocation said instrument shall direct the disposition to be made of the trust fund, or of the portion thereof affected by such revocation, and the Trustee shall make, execute and deliver such instruments, if any, and make such conveyances and transfers of property as may be necessary or proper in order to carry the same into effect, and no one shall have any right, interest or estate under this indenture except subject to the proper modification, alteration or revocation thereof.

The trust remained in this form in 1924 when $124,325.97, the net income for that year, was paid by the trustee to petitioner's wife. (R. 4.) In

petitioner's report of his income for that year, he made note of this trust and the amount of the income, but computed his tax without regard to such income. (R. 5–6.) He was later assessed $44,687.43, with interest, on the income from the trust property, which he paid under protest. (R. 6.) A claim for refund was thereafter filed and rejected (R. 7), whereupon this action was instituted. A motion to dismiss (R. 3) was granted (R. 2) and upon appeal the judgment was affirmed (R. 33–34). Petition for certiorari was not opposed.

SUMMARY OF ARGUMENT

Petitioner had power to revest in himself title to the corpus as well as the power to cause the income of the trust to be distributed to himself. Looking through the form of such a transaction, it appears that there has been little change in substance. Under the New York statute petitioner is still deemed to be the absolute owner of the estate conveyed so far as the rights of creditors and purchasers are concerned. This Court has held that the reservation of a power of revocation makes a transfer incomplete and it is not inconsistent with the rules of property to disregard for tax purposes the incomplete transfer and treat this transaction just as though the property still belonged to petitioner. There are many decisions to the effect that attempts to divide income from property before the tax attaches are ineffective for income-tax purposes. We submit that under those decisions and under the

doctrine of constructive receipt petitioner may constitutionally be held accountable for the income from the trust.

The contention that the application of the statute to income from a trust established prior to the enactment of the Revenue Act of 1924 renders it invalid finds no support in the decisions of this Court.

ARGUMENT

I

CONGRESS DID NOT EXCEED ITS POWER IN HOLDING THE GRANTOR ACCOUNTABLE FOR THE INCOME PRODUCED BY THE TRUST ESTATE HERE INVOLVED

This case does not present any question of statutory construction. The tax is plainly imposed by the explicit language of Section 219 (g) and (h) if that section is constitutional. It is clear and unambiguous and provides in effect that the grantor of a trust who has reserved the power to revest in himself title to the corpus, or who in his discretion may cause the income of the trust to be distributed or held for future distribution to himself, shall include the income of such trust in computing his own net income.

In the seventh paragraph of the trust here involved petitioner reserved the right from time to time during the continuance of the trust to "modify or alter in any manner, or revoke in whole or in part, this indenture and the trusts then existing." (R. 12–13.) Thus it is clear that petitioner had the

power to revest in himself the title to the corpus, as well as the power to cause the income of the trust to be distributed to himself. Accordingly, subdivisions (g) and (h) of Section 219 both apply. Petitioner's assertion (Brief, pp. 12–13) that his powers related only to the principal, and not to the income, is, we submit, without foundation.

This legislation looks through the form of the transaction and determines that in the case of revocable trusts there has been little change in substance. While the property was in form transferred by petitioner, and his wife received the income from the trustee, petitioner was in the same position as if he were making gifts from time to time of the income and without obligation to continue them. As said by the District Court in its opinion granting the motion to dismiss (R. 25):

> The New York Court of Appeals rightly characterized the income from a revocable trust as proceeding from his bounty and subject to his control, *Van Cott* v. *Prentice, supra,* pages 52–3.

Through the exercise of his power to modify, alter, or revoke the trust, petitioner at all times had the right either wholly to retake the corpus or to receive the income, which is "that which gives value to property." (*Pollock* v. *Farmers' Loan & Trust Co.,* 158 U. S. 601, 628.)

In the language of the District Court (R. 25):

> The trust property may of course by a proper instrument be sold by the settlor or

the income therefrom transferred before its accrual to a third person, such acts being implied assertions of his unqualified right to repossession. In the present case taxpayer expressly reserved unfettered power to sell and deal with the securities in the corpus of the trust; this would in any event have been possible by the exercise of his power of revocation. Income arising from property so completely subject to the settlor's needs and wishes may properly be taxed to him in order to effectuate the purposes of the surtax provisions. The pleader's conclusion that the creation of the trust herein involved was "bona fide" may be disregarded, for in so far as it means anything it means that the settlor had in view other purposes than reduction of his tax liability; this does not alter the fact that the purpose of the surtax provisions are set at naught by the revocable trust.

As the Circuit Court of Appeals expressed it (R. 32):

> A settlor of a revocable trust has a sufficient interest in the income of the trust and a relation thereto to justify the claim of a necessity for a fair and proper tax imposition requiring the settlor to pay. He, at all times, has the power to make the income derived from the trust, his own. To defeat tax evasion, at least the higher surtax, Congress, by this statute, has determined that a grantor who may change or modify the gift, even to putting an end to its continuance, must pay.

In this case it is not so important to determine what interest the beneficiary took under the trust; the real inquiry is, what interest did the petitioner retain? When it is considered that he reserved to himself the sole power of revocation, and the right at any time to revest in himself the corpus, and that even without revocation he could in his discretion elect to take the income, it is clear that the property which the petitioner conveyed to the trust is still his if he but reach out his hand and take it.

There is no authority in this Court which denies the power of Congress to tax the income of such a trust to the grantor thereof, and such decisions as there are on analogous questions tend strongly to sustain such power.

Petitioner's argument, based upon certain language in the opinion of this Court in *Eisner* v. *Macomber,* 252 U. S. 189, 206–207, can not be answered better than in the words of the District Court (R. 24):

> The *Macomber case,* however, is not authority for the proposition which plaintiff asserts. There Mr. Justice Pitney, says:
>
> "Here we have the essential matter: *Not* a gain *accruing* to capital, not a *growth* or *increment* of value *in* the investment; but a gain, a profit, something of exchangeable value *proceeding* from the property severed from the capital however invested or employed, and *coming in* being 'derived,' that is, *received* or *drawn by* the recipient (the taxpayer) for his *separate* use, benefit, and disposal; *that* is income derived from property."

> But the context and the italicization show that the emphasis was not at all upon that part of the sentence which would be relevant here. The decision merely holds that since the power given by the Sixteenth Amendment was to tax income, only income could be taxed; there was no occasion to decide and there was no decision as against whom the income could be taxed. Regardless of whether or not the Solicitor of the Treasury Department was properly influenced by *Eisner* v. *Macomber* in interpreting a doubtful statute, it is not a precedent on the present question of constitutionality.

Eisner v. *Macomber, supra,* is clearly not in point, and other decisions of this Court are more closely analogous to the present question.

This Court has already held that the reservation of a power of revocation makes a transfer incomplete. *Chase Nat. Bank* v. *United States,* 278 U. S. 327; *Reinecke* v. *Northern Trust Co.,* 278 U. S. 339. In *Chase Nat. Bank* v. *United States, supra,* it was said (p. 336):

> Such an outstanding power residing exclusively in a donor to recall a gift after it is made is a limitation on the gift which makes it incomplete as to the donor as well as to the donee * * *.

Applying that principle, it will be seen that up to the very moment when each individual payment of income was made to petitioner's wife the gift to her was incomplete; it was not beyond the control

of petitioner until she actually received it. Accordingly, putting aside the form of the transaction, each separate payment to petitioner's wife may be treated as a separate gift from him. If instead of allowing his wife to take the income petitioner had exercised his absolute right to take it himself, he would have been obliged to account for it as a part of his gross income, even though he immediately made a gift of the identical funds to his wife. We submit that petitioner could not, contrary to the express will of Congress, by first making an uncompleted gift of the income, deprive the Government of the right to tax it to him. We think that in substance it is not inconsistent with the rules of property to disregard for tax purposes the incomplete gift which has gone before and treat this transaction just as though the property still belonged to the petitioner and he had made the completed gift of the income to his wife after first receiving it himself.

In *Chase Nat. Bank* v. *United States, supra,* this Court disregarded the "vested" interest of the beneficiaries in certain insurance policies and held (p. 335) that the reserved interest of the decedent was "by no means the least substantial of the legal incidents of ownership" and regarded the transaction for estate tax purposes as a transfer at death of the *whole corpus.* In *Reinecke* v. *Northern Trust Co., supra,* the estate tax which was sustained was laid upon the *whole corpus* of the two revocable trusts, disregarding the fact that an interest had

been theretofore created through an uncompleted gift. This Court will not hesitate to sweep aside technical distinctions when they are raised to defeat the effective operation of a revenue measure. Thus, in *Chase Nat. Bank* v. *United States, supra,* it was held that the nonexercise of the power to change the beneficiary of a life-insurance policy was no less a transfer than would have been a transfer effected in other ways.

Also in *Taft* v. *Bowers,* 278 U. S. 470, it was held that Congress had power to require that for purposes of taxation the donee of a gift should accept the position of the donor in respect of the thing received, and the donee in that case was held subject to tax upon the sale of the property measured by the whole gain over the original cost to the donor.

Again, in *United States* v. *Robbins,* 269 U. S. 315, it was held that Congress had power to tax the husband upon the whole of the income from community property, in view of his power of disposition thereof, even if it were assumed that the wife also had an interest therein (p. 327).

The power of Congress to require a succeeding owner, in respect of taxation, to assume the place of his predecessor was pointed out in *United States* v. *Phellis,* 257 U. S. 156, 172.

In *Bullen* v. *Wisconsin,* 240 U. S. 625, 631, it was held that the Supreme Court of Wisconsin was "fully justified" in treating Bullen's general

power of disposition as equivalent to a fee for the purposes of the taxing statute and that there was no constitutional objection to its doing so. Petitioner's absolute and unconditional right to modify, alter or revoke the trust is treated, for tax purposes, as a general power to appoint (*Bullen* v. *Wisconsin, supra; Farmers' Loan & Trust Co.* v. *Bowers* (C. C. A. 2d), 29 F. (2d) 14, 18) and Congress was fully justified in treating his rights as equivalent to a fee and holding him accountable for the income which it produced.

In cases such as this, where the question is as to the power of Congress, local rules with respect to the subject matter of the tax are not of great importance. But here the New York law tends to support the view that the creation of a revocable trust makes no substantial change in the position of the grantor. The effect of a power of revocation under the local law applicable here was stated by the Circuit Court of Appeals as follows (R. 32):

> By Section 145 of the New York Real Property Law (where this indenture was made) when the grantor in the conveyance reserves to himself for his own benefit, a power of revocation, he is deemed the absolute owner of the estate conveyed so far as the rights of creditors and purchasers are concerned, illustrating how little the beneficiary obtains apart from the income.

Section 145 of the Real Property Law of New York is a part of the Consolidated Laws effective February 17, 1909. It reads as follows:

> Where the grantor in a conveyance reserves to himself for his own benefit, an absolute power of revocation, he is to be still deemed the absolute owner of the estate conveyed, so far as the rights of creditors and purchasers are concerned.

Both the District Court (R. 25) and the Circuit Court of Appeals (R. 32) regarded this statute as applying to personal property. With respect to the doubt expressed in petitioner's brief (p. 10) as to whether the earlier New York cases, which hold that it does relate to personalty (*Hutton* v. *Benkard*, 92 N. Y. 295; *Matter of Cooksey*, 182 N. Y. 92, 97; *Matter of Moehring*, 154 N. Y. 423, 427), are applicable since the adoption of the Consolidated Laws in 1909, we call attention to the opinion of Surrogate Fowler in 1912, in the case of *In re Mayo's Will*, 136 N. Y. S. 1066, 1068, where it was said:

> Powers connected with personal property are now for all practical purposes coextensive with powers in the law of real property of this state, and they are governed by the same rules. (Citing cases.)

In any case to which the statute is applicable the corpus of a trust estate created by revocable indenture is manifestly still valuable to the grantor in that it forms the basis of credit. But, in any event,

the statute does no more than express what is implicit in the idea of a complete power of revocation. Enjoying that right the grantor may use it for the benefit of his creditors, or may take the property and resell it, or may continue the trust to enjoy the income himself.

Of course the money was income and it was income from property which in a very real sense still belonged to the petitioner. There are many decisions to the effect that attempts to divide income from property before the tax attaches are ineffective for income tax purposes. See *Bing* v. *Bowers* (S. D. N. Y.), 22 F. (2d) 450; *Willard C. Hill* v. *Commissioner,* and *William H. Plumer* v. *Commissioner* (C. C. A. 1st), decided January 23, 1930, not yet reported; *Walter S. Benedict* v. *Warren G. Price* (E. D. N. Y.), decided November 26, 1929, not yet reported; *Rosenwald* v. *Commissioner* (C. C. A. 7th), 33 F. (2d) 423, certiorari denied, 280 U. S. 77A. In *Mitchel* v. *Bowers* (C. C. A. 2d), 15 F. (2d) 287, certiorari denied, 273 U. S. 759, the right to terminate a contract between a member of a partnership and his wife providing for the division of his share of partnership profits, so that the absolute disposition of the profits was always within the husband's power, was one of the grounds on which the court required him to account for his entire share. The Board of Tax Appeals has consistently applied the principle that where the taxpayer retains his interest in the property or fund

from which the income was derived, the income is taxable to him and not to the person who eventually receives the money. *J. V. Leydig v. Commissioner,* 15 B. T. A. 124, 132.

The presumption, of course, is in favor of the validity of an Act of Congress. This presumption, repeatedly indulged, is particularly strong when considering a Revenue Act. (*Nicol* v. *Ames,* 173 U. S. 509.)

Moreover, this statute has a special justification. It is clearly shown by the legislative history that the Act was designed to prevent avoidance of the surtaxes. See p. 21, House Report 179 on the Revenue Bill of 1924; p. 25, Senate Report 398 on the Internal Revenue Bill of 1924; 68th Congress, 1st Session, Serial Nos. 8226 and 8220. From the foundation of the Government taxes have been imposed in proportion to ability to bear the burden (*Knowlton* v. *Moore,* 178 U. S. 41, 98), and the principle of imposing taxes at higher rates on larger incomes has been sustained. (*Brushaber* v. *Union Pac. R. R.,* 240 U. S. 1; *Burk-Waggoner Assn.* v. *Hopkins,* 269 U. S. 110.) Therefore, a statute designed to protect the legislative policy of surtaxes should be treated no differently from a statute designed to prevent the complete avoidance of a tax.

We submit that Congress is not impotent to look through the form of a trust such as is here involved and require petitioner to treat the income there-

from as his own. In this case, as in the usual case of this sort, the beneficiary of the trust was one whom the grantor was bound to support and for whose benefit he would naturally have expended income in any event. We think that Congress might properly assume that trusts of this sort are commonly in lieu of other provisions for the support of dependents and that in reality the trust does not operate to decrease the grantor's income. A brief *amicus curiae* is on file which discusses the case of a revocable charitable trust. In such a case, it is true, the income is not received by some person for whom petitioner would normally make like provision from the same income if he took it himself. It will be time enough to consider the statute as applied to a charitable trust when such a case is presented (*United States* v. *Sullivan,* 274 U. S. 259, 264; *Yazoo & Mississippi Valley R. R.* v. *Jackson Vinegar Co.,* 226 U. S. 217, 219; *Old Colony Tr. Co.* v. *Comm'r. Int. Rev.,* 279 U. S. 716, 731), but it is submitted that no distinction as to the taxability to the grantor of the income of a revocable trust may validly be based on the character of the recipient of the income. It is the grantor's complete control and power to dispose for his own benefit of the corpus and income of the trust which is the basis of the tax. But in the case of a revocable charitable trust the grantor would be deemed to have given the income to the charity and such payments would be deductible from his gross income up to the permitted 15 per cent.

It is settled doctrine that Congress may require that property transferred to avoid a tax may be treated as part of the estate for the purposes of the estate tax (*Nichols* v. *Coolidge,* 274 U. S. 531, 542), and under that principle even a *completed* transfer may be disregarded. Accordingly, we think it is not open to substantial doubt that Congress may disregard a gift which was incomplete. At the moment when the beneficiary received the income, the gift was completed, and under the principle of constructive receipt which is recognized by a long line of decisions recently collected and approved by this Court in *Old Colony Tr. Co.* v. *Comm'r. Int. Rev.,* 279 U. S. 716, the income from property over which petitioner had at all times complete control may properly be treated as having been received by him and then paid over to the beneficiary.

We think it is clear from the foregoing that whatever other limitations may be imposed upon the taxing power of Congress, it has ample authority to require that an owner who has made but an uncompleted, because wholly revocable, gift of his property shall account for the income which it produces.

II

THE DECISIONS OF THIS COURT FORECLOSE THE CONTENTION THAT THE APPLICATION OF THE STATUTE TO INCOME FROM A TRUST ESTABLISHED PRIOR TO THE ENACTMENT OF THE REVENUE ACT OF 1924 RENDERS IT INVALID

Petitioner's argument based on the assumed retroactivity of the statute is wholly without merit. It is difficult to ascertain from the brief (pp. 25–26) whether petitioner's complaint is that it applies to a trust created prior to the passage of the Revenue Act of 1924, or that it applies to income derived prior to that date. Either objection is inadmissible.

In the first place, on the facts of this case there is, properly speaking, no question of retroactivity involved. As the Circuit Court of Appeals said (R. 33):

> The statute deals with the present condition with revocability residing in the settlor. Each payment of income which takes place after the passage of the statute is subject to its terms. Therefore, after the effective date of the taxing statute, this income was subject to taxation under its requirements. The taxing statute is not retroactive. (*Reinecke* vs. *Northern Trust Co., supra; Chase Natl. Bank* vs. *United States, supra; Saltonstall* vs. *Saltonstall,* 276 U. S. 260.)

Even if it were assumed that the application of the Act to a trust created in 1922 involved some element of retroactivity, it would by no means invalidate the statute.

The only decisions of this Court holding a taxing statute invalid because of retroactivity are *Nichols* v. *Coolidge,* 274 U. S. 531; *Blodgett* v. *Holden,* 275 U. S. 142 and *Untermyer* v. *Anderson,* 276 U. S. 440. In none of these cases was the objection to retroactivity as such, but it was based on the fact that the statute attempted to tax a past transaction which was made at a time when no tax thereon was foreseeable and which at the time that the taxing statute was enacted the grantor was powerless to undo. The imposition of an excise on such a transaction was held to be an arbitrary exaction, not within the taxing power. No such situation is presented here. The principles enunciated in those cases have no application to a transaction which is completely revocable by the grantor. He can undo the transaction at his will and make any new disposition of the property which the law permits, with full knowledge of the tax consequence. If it was really his desire to make provision for his wife, he may revoke the trust and create a new one without a power of revocation, and thus avoid from that time forward all liability for the tax upon the income thereof.

The only remaining objection is that certain instalments of income paid during the taxable year 1924, prior to the passage of the Revenue Act of 1924, may have become taxable to him without his foreseeing that consequence. As to such a suggestion the recent decision of this Court in *Cooper* v. *United States,* No. 93, October Term, 1929, decided

February 24, 1930, should be a complete answer. In that case the gift to the donee and the sale by the donee which resulted in the tax both were consummated before the enactment of the Revenue Act of 1921, under which the tax was collected. This Court held there was nothing unusual, arbitrary or capricious in the provision of the statute, and said:

> That the questioned provision cannot be declared in conflict with the Federal Constitution merely because it requires gains from prior but recent transactions to be treated as part of the taxpayer's gross income has not been open to serious doubt since *Brushaber* v. *Union Pacific R. R.*, 240 U. S. 1, and *Lynch* v. *Hornby*, 247 U. S. 339.

In the instant case the income which was the occasion for the tax was received during the year 1924, the taxable period provided by Section 200 of the statute. The Act was passed June 2, 1924, well within the taxable period, and it dealt with current events. Such limited retroactivity has been uniformly recognized as valid.

All of the Federal Income Tax Acts have been retroactive in the sense that they applied to income for a period which began prior to the passage of the several Acts. We submit that in so far as income taxes are concerned the practice in the past forecloses the contention that retroactivity brings an Act of Congress within the due process clause of the Fifth Amendment. This should be particularly true where, as here, the statute has a special

justification in the necessity for preventing tax avoidance.

The measure of the tax is income received during 1924, and the fact that the trust was established in a prior year is of no more consequence than it was in *Reinecke* v. *Northern Trust Co., supra,* or in *Saltonstall* v. *Saltonstall,* 276 U. S. 260. The receipt of income, the event which gave rise to the tax, occurred in 1924, and the validity of the application of the 1924 Act to such income is settled by the *Cooper case, supra.*

CONCLUSION

In view of the foregoing, it is respectfully submitted that the judgment of the court below is correct and should be affirmed.

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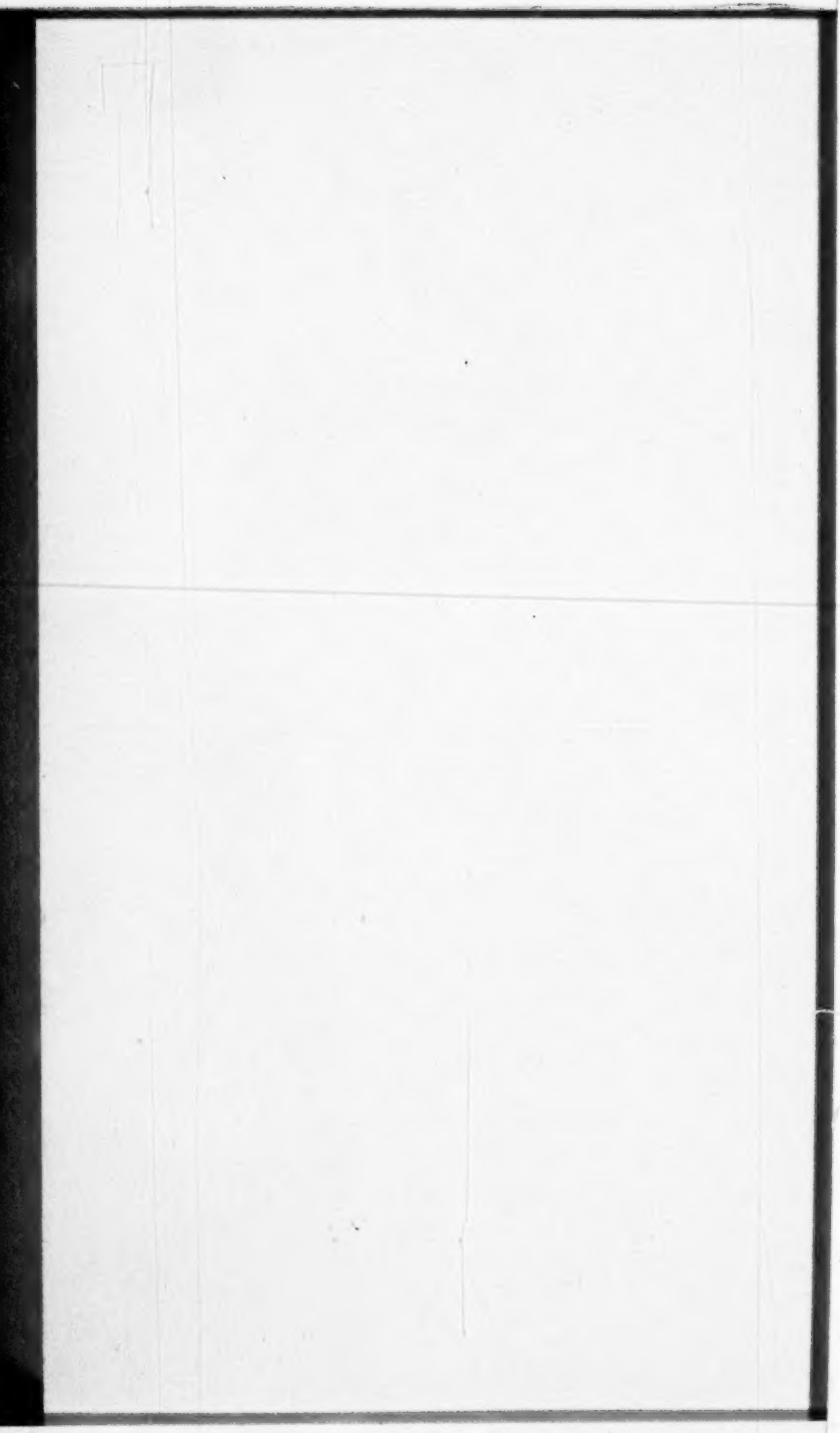

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1929

No. 344

CHARLES A. CORLISS,
Petitioner,

vs.

FRANK K. BOWERS, as Collector of Internal Revenue for the Second District of New York,
Respondent.

BRIEF OF AMICI CURIAE.

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Subject Index.

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BRIEF OF AMICI CURIAE.

INTRODUCTORY STATEMENT.

Counsel appearing herein as *amici curiae* submit this brief in the belief that one of the most significant issues in the case has not been considered by the District Court or by the Circuit Court of Appeals. We respectfully direct the attention of this court to the

effect upon *charitable trusts* of the decision of the lower court and of the statute therein considered.

In 1920, Mrs. Elise A. Drexler conveyed property in trust to certain trustees, whose duties were to manage the property, collect the income, pay therefrom the expenses of the property, and distribute the balance of the income *exclusively for charitable purposes.* Mrs. Drexler, by the terms of the trust instrument reserved to herself the power to revoke the trust at any time during her life, by an instrument in writing signed by her and recorded in the office of the County Recorder of the City and County of San Francisco. She has never exercised the power of revocation and has never received any part of the income of the trust; all of the income, after deducting the expenses of the property, has been paid out wholly for charitable purposes. Nevertheless, in 1924 and in subsequent years, taxes on the income of the trust were levied against Mrs. Drexler. Upon the approval of this tax by the Commissioner of Internal Revenue, an appeal was taken by Mrs. Drexler to the Board of Tax Appeals, and that appeal is now awaiting a hearing.

The Treasury Department has construed sections 219g and 219h of the Revenue Act as applying to any revocable trust, private or charitable. If this construction be sound, then the reasonableness of the statute cannot be determined without considering its effect upon charitable as well as upon private trusts. We are also apprehensive, in the event that this court

uphold the statute in the instant case, that the decision may preclude further inquiry, particularly into its application to charitable trusts. To guard against such an eventuality, we respectfully urge this court to consider, as part of this case, whether a trust for charity, such as the Drexler trust, comes within the intended purview of the statute; and if it does, whether the statute when applied to such a trust, is valid. If it be decided that when applied to charitable trusts the statute is invalid, does this invalidity vitiate the statute in all cases?

It is not our contention that all of these matters must necessarily be decided in the instant case; but they are, we believe, within the scope of the present inquiry, and should be considered therein, even though the ultimate decision be reserved. We have therefore dealt briefly with the application of the problem to the case of charitable trusts.

I.

IN A CHARITABLE TRUST, THE RESERVATION BY THE TRUSTOR OF THE POWER OF REVOCATION CANNOT RESULT IN EVASION OF INCOME TAX.

The theory of the government, as expressed in the briefs before the Circuit Court of Appeals, and in the opinion of that court, is that when a revocable trust is created, there is the possibility that the purpose thereof is simply to evade the higher surtaxes. The government admits that it is unreasonable to tax

a trustor who receives none of the income of the trust. The government contends, however, that in a situation where it is likely or *possible* from a practical and reasonable point of view, that the income of the trust may be received by the trustor, he may be taxed, and Congress, in order to effectuate its object—to prevent evasion of surtaxes—may penalize the trustor of a *bona fide* revocable trust. In other words, the government takes the position that every trustor of a revocable trust is conclusively presumed to be guilty of an evasion. Why? Because in some cases there might be a suspicion of evasion.

The justice and reasonableness of this position are at least open to grave doubt, and we are in hearty accord with the views of petitioner in the court below. But that very position involves an important admission, which is particularly significant in considering the case of a trust for charity. The admission is that *where there is no likelihood or possibility of evasion,* a tax levied on the trustor is unconstitutional. This is undeniably true in virtue of the government's major premise: the absence of such likelihood or possibility renders the tax arbitrary and capricious.

A. In a charitable trust there is no likelihood or possibility that the trustor may receive any of the income of the trust.

The government justifies the tax upon the trustor of a revocable trust upon the theory that by the device of a revocable trust for the benefit of the trustor's immediate family or friends, it is possible and reasonably probable that a taxpayer will receive income free from the higher surtaxes. It is essential to the sup-

port of this theory that there be *income to some person through whom it may conceivably find its way back to the trustor*. In the case of a trust for charity, this essential element cannot exist.

A charitable trust cannot be used by the trustor to evade taxes. Neither the trustor, nor a member of his family, nor a trusted friend receives or can receive any of the income; it is wholly paid out for charitable uses. It is beyond all reason to suppose that a charitable trust could be used in the same manner as a private trust—as a device by which the income might find its way back to the trustor without his paying the taxes. The nature of charities, the purposes for which their funds are used, the obligations assumed by the trustees, the close scrutiny by the courts, and the power of the attorney-general to enforce the trust on behalf of the beneficiaries as to accrued income, despite the power of revocation, make this contingency so remote and improbable, if not impossible, as to afford no ground for the suspicion upon which the government justifies the tax.

Moreover, Congress has declared that trusts for charity are never to be judged by fixed rules of conclusive presumption, or convicted upon suspicion. Whether the trustor of a revocable trust for charity receives any income from the trust is made a question of fact by the very terms of the Revenue Act. Section 103, subdivision 6, of the Act of 1928, exempts from income tax

> "corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or edu-

cational purposes, or for the prevention of cruelty to children or animals, *no part of the net earnings of which inures to the benefit of any private shareholder or individual;*" (Italics ours.)

It is evident that Congress has declared, in effect, that if *as a fact,* "no part of the net earnings" of the trust "inures to the benefit of any private * * * individual", then the income is exempt.

If the government grant exemption to a beneficiary of a trust for charity, revocable or irrevocable, it follows that *no private person* can or does receive any of the income. In classifying a trust as charitable, and granting to the beneficiary the resulting exemption, it is necessarily determined *as a fact* that "no part of the net earnings" of the trust "inures to the benefit of any private * * * individual". There is no warrant for reading into the statute the exception that in the case of a revocable trust, the income from which would otherwise be exempt, it shall be conclusively presumed, in spite of the fact, that *some* part of the income inures to the benefit of a private individual. The trust is either charitable or taxable. The government cannot justify its tax to the trustor upon a suspicion which is dissolved by its own findings of fact. It cannot blow hot and cold.

B. To take advantage of an exemption expressly granted by the statute is not an evasion of tax.

If the above position be sound, and it be true that the trustor cannot profit from the trust, then the only conceivable evasion occurs when the charitable trust *is created.* The trustor has disposed of his capi-

tal in such a manner as to render all the income thereof immune from tax; he may be said, then, to be "evading" the tax! Of course, this argument applies with equal force to *irrevocable trusts,* for if this be evasion, certainly *permanent "evasion"* is no less reprehensible than *temporary or contingent "evasion".* But the answer is the same in either case: *exemption is not evasion.* One should be able to avail one's self of an expressly granted exemption from tax without being subjected to a special penalty. The same statute cannot be construed so as to give and to take away. If this were not so, then every employment of capital which operates to decrease the taxable income of the owner, would be an evasion. By this process of reasoning, even the investment of funds in tax exempt securities constitutes an evasion. The courts have not taken that position. They have recognized that there is no impropriety in an actual and bona fide disposition of property even though its purpose is that of "cutting down the total family income tax contribution to the government". (*Bing v. Bowers,* 22 Fed. (2d) 450, 452.) Even "a device to avoid the burden of revenue acts may be resorted to, if effectuated by legal means". (*Fraser v. Nauts,* 8 Fed. (2d) 106, 107.)

A mere avoidance of tax is not an evasion.

Holmes, Federal Taxes (6th Ed. 1925) p. 115;
Weeks v. Sibley, 269 Fed. 155, 158.

In the last-named case the court said:

"Bearing in mind the rule of construction which the Supreme Court announced in the case

> of Gould v. Gould, 245 U. S. 151, 38 Sup. Ct. 53, 62 L. Ed. 211, and numerous other cases, to the effect that the provisions of the taxing statutes are not to be extended by implication beyond the clear import of the language used, and that they are to be construed most strongly against the government and in favor of the taxpayer, it is the opinion of this court that the right to change the status of an organization, or to dissolve an organization in any legal manner, is not made ineffectual because the motive impelling the change is to reduce or avoid taxation in the future. The right so to do is an incidental right, inseparably connected with an individual's right to own and control his property. It is practically identical with the sale by a citizen of tax-burdened securities and the investment of the proceeds thereof in tax-exempt ones, for the purpose of reducing or avoiding taxation.
>
> "It is not unnatural that any thoughtful business man take such steps. It is altogether different from tax dodging, the hiding of taxable property, or the doing of some unlawful or illegal thing in order to avoid taxation."

If an avoidance of tax for one's private benefit is proper when accomplished by legal means, certainly the same must be said of the use of a statutory exemption for the benefit of objects of charity. It is, of course, unnecessary to point out that Congress, by the exemption provisions in the Revenue Act, has cordially welcomed the creation of charitable trusts.

See

Slocum v. Bowers, 15 Fed. (2d) 400, 403.

To summarize this argument, the creation of a revocable trust for charity cannot possibly constitute

an evasion of surtaxes, for the reason that the income from such a trust is exempt from taxation. It cannot be seriously contended that when Congress provides for specific exemptions from tax on grounds of public policy, it is an evasion of the law to take advantage of the exemptions. Such a contention would carry with it the corollary that every use to which money is put, no matter how legitimate, is an evasion if ultimately it brings in less money to the government. That Congress intended no such result is plain; and it is equally plain that even if such had been its purpose, the attainment of it was quite beyond its powers.

II.

INCOME WHICH IS EXEMPT FROM TAX BY THE TERMS OF THE STATUTE CANNOT BE TAXED UNDER THE PROVISIONS OF ANOTHER PART OF THE SAME STATUTE.

In *Eisner v. Macomber*, 252 U. S. 189, 64 L. Ed. 521, this court squarely held that in order to justify an income tax there must be actual income derived from the property and received by the taxpayer. The government, and the court below in the instant case, construe *Eisner v. Macomber* as holding merely that there must be income; and it is argued that the decision in that case places no obstacle in the way of taxing one who does not receive the income, if income is actually received by someone. To us this appears to be a grave misconception, both of the language and the logic of the decision. If it be arbitrary and unjustifiable to tax one who does not receive income

when there is no income to anyone, then it is equally arbitrary and unjustifiable to tax one who likewise does not receive any income, merely because income is received by another. It follows that if one cannot be taxed because there is no income, he cannot be taxed though there be income, *if he does not receive it.*

Granting, however, that the holding of *Eisner v. Macomber* may warrant the government's interpretation; *does it also follow that the principle may be extended to justify a tax upon one who does not receive income, even when the income itself is exempt from taxation?*

The answer is revealed by contrasting the private trust with the charitable trust. The income of a private trust, *revocable or irrevocable,* is taxable, *and is always taxed.* When the government taxes the trustor of a revocable trust instead of the beneficiary, it seeks merely to obtain the highest surtax by lumping together the trustor's income and the income of the trust. Let us assume that it is justified in so doing in order to make the revocable *private* trust unprofitable as a device for evasion. But the income of a charitable trust as such, *revocable or irrevocable,* is not taxable. Hence, when the government undertakes to tax the trustor of a revocable trust for charity, its action cannot be justified on the ground that it is seeking to collect a tax that it might lose by an evasion. It is simply *penalizing the reservation of the power of revocation.* There is a serious doubt whether Congress has the power to go so far as to penalize this perfectly legitimate and highly necessary power even in pur-

suance of the legitimate object of preventing evasion. But certainly it cannot be contended that Congress has this power *in the absence of such an object;* "* * * under the mere guise of reaching something within its powers Congress may not lay a charge upon what is beyond them." (*Nichols v. Coolidge,* 274 U. S. 531, 71 L. Ed. 1184, 52 A. L. R. 1081).

III.

THE PRACTICAL RESULT OF A TAX ON THE TRUSTOR OF A REVOCABLE TRUST FOR CHARITY IS SUCH AS TO RENDER THE TAX UNREASONABLE, ARBITRARY AND CAPRICIOUS.

In *Nichols v. Coolidge,* supra, at page 541, this court said:

> "Taxes are very real things and statutes imposing them are estimated by practical results."

Indeed, the government insists upon a practical approach to the problem involved in the instant case. Its position is characterized by a refusal to recognize that the trustor of a revocable trust, unless and until the power of revocation be exercised, has, in *legal* effect, no more right to the income than has the trustor of an irrevocable trust. In *Eisner v. Macomber,* supra, at 252 U. S. 214, this court declared that it could not

> "ignore the substantial difference between corporation and stockholder; treat the entire organization as unreal; look upon stockholders as partners, when they are not such; treat them as having in equity a right to a partition of the corporate assets, when they have none; and indulge the fiction that they have received and realized a share of the

profits of the company which in truth they have neither received nor realized * * *".

The government's position in regard to the statute in question ignores differences fully as substantial as those above mentioned, and indulges in a similar fiction. Upon what does the government justify this disregard of basic principles of the law of trusts, and this wide departure from the accepted definition of income? Assuming a lack of conscience in taxpayers generally, it speculates upon what may happen if the tax be not levied upon the trustor. This speculative possibility constitutes the sole justification for a tax which, on its face, is arbitrary and unreasonable.

The other side of the picture is fully as interesting, and, it is submitted, equally material. If speculation as to the probable results in the absence of the statute will help *to sustain* a statute apparently invalid, may not speculation as to the probable results of its enforcement *serve to emphasize the invalidity of that same apparently invalid statute?* What would be the practical result of the imposition of a tax on the trustor of a revocable trust for charity, based upon the income of the trust?

A. Charitable trusts may be discouraged.

Few persons are willing to set aside a large amount of capital, receive nothing from it, and then, in addition, pay a tax on the income from that capital. Compulsory annual tribute to the government as a penalty for having made, at some past date, a gift in trust to charity is a practical deterrent of considerable force.

Of course, a trustor could decrease the amount of the trust estate, reserving enough capital to himself to pay the income tax on the trust (after paying a tax on the income of that same reserved capital). But whichever course is taken—the elimination of the trust or the decrease in its capital endowment—the result would be deplorable. The law has heretofore shown a distinctly hospitable attitude toward charitable trusts, and the Revenue Act expresses this policy in its exemption provisions. As the court says in *Slocum v. Bowers*, 15 Fed. (2d) 400, 403:

> "The policy of exempting these corporations is firmly established and has been continuously expanding ever since the system of income taxation was adopted."

If the sections in question be held to apply to charitable trusts, then this policy is reversed, for the tax, while acting upon the trustor, strikes at the trust itself.

B. The trustor may be forced to give up the power of revocation.

Congress has undertaken to force a trustor to pay an annual tax out of his other resources, if he has any, merely by reason of his having reserved the power of revocation. The imposition of this tax, if it does not prevent a trustor from establishing the trust in the first instance, or lead him to destroy an existing trust, may force him to relinquish his power of revocation. Perhaps this is the object of the statute: to abolish powers of revocation and to make all trusts irrevocable. This would be indeed a strange object for Congressional legislation. We have already suggested

that there is some doubt whether Congress by the imposition of a penalty in the guise of a taxing statute, can deprive persons of the right to make a disposition of their property in trust in a manner sanctioned by the law of the state in which the trust is created. Congress does not and cannot ignore local law in the enactment of a tax statute.

United States v. Bolster, 26 Fed. (2d) 760.

But assuming that Congress may legislate on the subject, is the particular legislation reasonable? Is the power of revocation so idle or so dangerous that its elimination by the indirect method of prohibitive taxation, constitutes a reasonable object on the part of Congress?

The decisions furnish a ready answer to this question.

In *Jones v. Clifton,* 101 U. S. 225, 25 L. Ed. 908, 910, Mr. Justice Field said:

> "The powers of revocation and appointment to other uses reserved the husband in the deeds in question do not impair their validity or their efficiency in transferring the estate to the wife, to be held by her until such revocation or appointment be made. Indeed, *such reservations are usual in family settlements* and are intended 'To meet the ever-varying interests of family connections.' Riggs v. Murray, 2 Johns. Ch. 565." (Italics ours.)

In *Van Cott v. Prentice,* 104 N. Y. 45, 10 N. E. 257, 261, the court said:

> "We discover nothing in the provisions of the deed, properly construed, inconsistent with a completely constituted trust, wholly voluntary and

> benevolent, and subject to revocation by the settlor at any moment,—*a kind of trust of which the books furnish many instances,* and which, indeed, are sometimes subject to doubt and suspicion if the power of revocation is absent." (Italics ours.)

In *Sims v. Brown,* (Mo.) 158 S. W. 624, 627, a similar statement is made:

> "In fact, courts of equity have always looked with suspicion upon voluntary trusts or settlements which do not reserve a power of revocation. Garnsey v. Mundy, 24 N. J. Eq. 243; 1 Perry on Trusts and Trustees (6th Ed.) § 104, footnote 3, p. 130."

In *Nichols v. Emery,* 109 Cal. 323, 331, 41 Pac. 1089, 50 Am. St. Rep. 43, Henshaw, J., said:

> "Indeed, this power of revocation was strongly favored in the case of voluntary settlements at common law, and such a trust without such a reservation was open to suspicion of undue advantage taken of the settler. (Lewin on Trusts, *75, 76; Perry on Trusts, Sec. 104.)"

It was only after many years that the American courts broke away from the early English rule that the absence of a power of revocation in a voluntary settlement was *prima facie evidence of mistake or fraud;* and even in the later decisions may be found—cases wherein such settlements were *attacked as being invalid because they did not contain the power.* See, for example,

> *Crumlish v. Security Trust & Safe Deposit Co.,* 8 Del. Ch. 375, 68 Atl. 388;
>
> *Reidy v. Small,* 154 Pa. 505, 26 Atl. 602, 20 L. R. A. 362.

The power of revocation, reasonable and natural in the private trust, *may be a necessity in the charitable trust*. In the private trust, the trustor has in mind particular beneficiaries, a limited duration, and usually very specific objects. If the trustees are chosen with care, and their powers and duties clearly defined, it is conceivable that the proper functioning of the trust may be left to them, subject to the intervention of the courts at the instance of the beneficiaries, if there should ever be a departure from the strict terms of the trust instrument.

No such simplicity attends the operation of a charitable trust. Here the beneficiaries are not always specific. They are frequently indeterminate. The duration of the trust is often unlimited. In the course of years circumstances change; certain objects may have become satisfied; other charitable purposes may become appealing; or there may arise necessities which are more pressing and more worthy than those for which provision was originally made. Suppose no power of revocation was reserved; what is to be done? And suppose, above all, that it become necessary, as has often been the case, that a part or all of the principal be used in order that the very purpose of the charity be preserved. If no power of revocation be reserved the trustor would stand destitute of the means to re-create the trust in such manner that the capital would be available to effectuate the charitable purpose and there would ensue one consequence of that so greatly dreaded institution, "The Dead Hand in Philanthropy".

If no power of revocation has been reserved, the charitable trust is, like any private trust, irrevocable.

Mott v. Morris, (Mo.) 155 S. W. 434, 437.

This is so even though the trustees fail to comply with some of its conditions.

Sickles v. City of New Orleans, 80 Fed. 868, 874.

The trustor cannot, by agreement with the trustees, or with the persons who happen to be the beneficiaries at the particular time, secure a change in the object of the trust.

Parish of Christ Church v. Trustees, etc., (Conn.) 35 Atl. 552, 555.

The only recourse is to the *cy pres* power of the courts. But this is exercised only when the trust object fails utterly—never where it is merely desirable to change the object to meet new conditions. And this last resort—the *cy pres* power—is a mere *rule of presumed intention.* It is never employed to make the most worthy and intelligent public use of the property, but *solely to carry out the intentions of the trustor, as closely as possible.*

Jackson v. Phillips, 14 Allen (Mass.) 539, 580.

Why should a trustor be forced to pursue an immutable course in his donations to charity? Why should he be required to risk the entire endowment to the intelligence, integrity, and sympathetic administration of the trustees? His trustees may disappoint him

though his interest in the object of his bounty may remain as lively as it was when he created the trust.

The very instances of the exercise of the *cy pres* power illustrate the importance and necessity of maintaining a watchful eye over the administration of a trust. The trustor may, perhaps, rely upon the courts to save the trusts if its object fails completely, and no doubt the court can make a plausible guess as to what the trustor might desire as a substitute. But to keep the objects of the trust responsive to the greatest necessities of the day is a task which the trustor might, naturally, consider is a function to be performed exclusively by him. If he create an irrevocable trust, he casts aside this opportunity.

Reason and experience lead to the same conclusion: the reservation of a power of revocation in a charitable trust is neither idle nor dangerous, but useful and necessary, and its abolition would be an unreasonable and arbitrary exercise of the powers of Congress.

C. The trustor may shift the burden of the tax to the beneficiaries of the charity.

The third step which the trustor may take is to pass the tax along where it would normally fall—upon the recipient of the income. This could be accomplished by a provision in the trust instrument requiring that the trustor be reimbursed from the revenue of the trust for any taxes paid by him on the income of the trust.

No doubt this is the most likely course which would be pursued. Certainly it would be the reasonable one. Resourceful persons, desirous of furthering worthy charitable objects, might not be easily deterred by the inhospitable attitude of Congress. They might create and maintain the trusts, safeguard the endowment by reserving the power of revocation, and let the trust pay its own income tax. In so doing, they would be following precisely the advice of the government, for it was urged in support of the *reasonableness of the tax, that the trustor could shift the burden to the beneficiaries.* This also seems to be the suggestion of the Circuit Court of Appeals, for that court says:

> "By such a trust indenture, the grantor gives and the grantee receives with knowledge of who shall bear the burden of taxation."

The result would be that the beneficiaries would pay income tax under a statute which expressly exempts them from payment of the tax. They would do more: *they would pay, in addition, the amount necessary to make up the surtax "evaded" by the trustor when he divided "his" income into his income and the income of the trust!*

This, it must be emphasized, is the *practical result* of the statute; and it is to the *practical* situation that the government has directed attention.

An interesting question of interpretation is suggested here. If the natural result of one section of a statute is to impose a tax upon income expressly exempt from the tax by the terms of another section

of the same statute, should not the two sections be construed together, and should it not follow that the former section is limited by the latter? In other words, when *section 219g* speaks of "income" of the trust, should it not, in view of *section 103, subdivision 6*, be interpreted to read "taxable income"?

In *Bankers' Trust Co. v. Bowers,* 295 Fed. 89, 96, the court said:

> "In interpreting a statute, the construction placed thereon should avoid unjust consequences, unless the language compels such a result, and a construction should be had with reference both to the history of the legislation and to other sections of the law with which it is in pari materia."

Further, on page 97, it is said:

> "The interpretation of statutes levying taxes must not extend beyond their provisions by implication, nor must they be interpreted beyond the clear import of the language used. In case of doubt, they are interpreted strongly against the government and in favor of the taxpayer. * * * Where a construction of a statute will occasion great inconvenience, or produce inequality or injustice, that view is to be vetoed if another and more reasonable interpretation is present in the statute. * * *".

In *Slocum v. Bowers,* 15 Fed. (2d) 400, the court considered the various statutory changes relating to the taxation of estates and trusts, and declared (page 403):

> "It is quite clear that the primary purpose of the amendments taxing estates and trusts as en-

> tities was to reach income that had not theretofore been presently taxable at all. A design to tax income where the beneficial ownership is in corporations generally exempt under the law accordingly seems contrary to the history and spirit of the statute."

Summarizing its conclusions, the court continued:

> "In view of the wide general exemption of charitable corporations under section 231 (6), supra, of the Act of 1918, the careful provision to exempt a corporation holding title to property the income of which is to be turned over to exempt corporations, the 15 per cent. exemption in the case of distributions of income to charity *inter vivos* by private individuals, and the permitted deduction by a fiduciary in his return of any part of the gross income of an estate which is paid or permanently set aside for religious, charitable, scientific, or educational corporations, it is hard to believe that in the one case of administration of an estate the exemption should turn on the technical question of whether the corporations seeking it have the legal or equitable title to the income. The policy of exempting these corporations is firmly established and has been continuously expanding ever since the system of income taxation was adopted. The statute should be read, if possible, in such a way as to carry out this policy and not to make the result turn on accidental circumstances or legal technicalities."

If, however, this construction be abandoned, and it be held that the statute applies to charitable trusts, the invalidity seems plain.

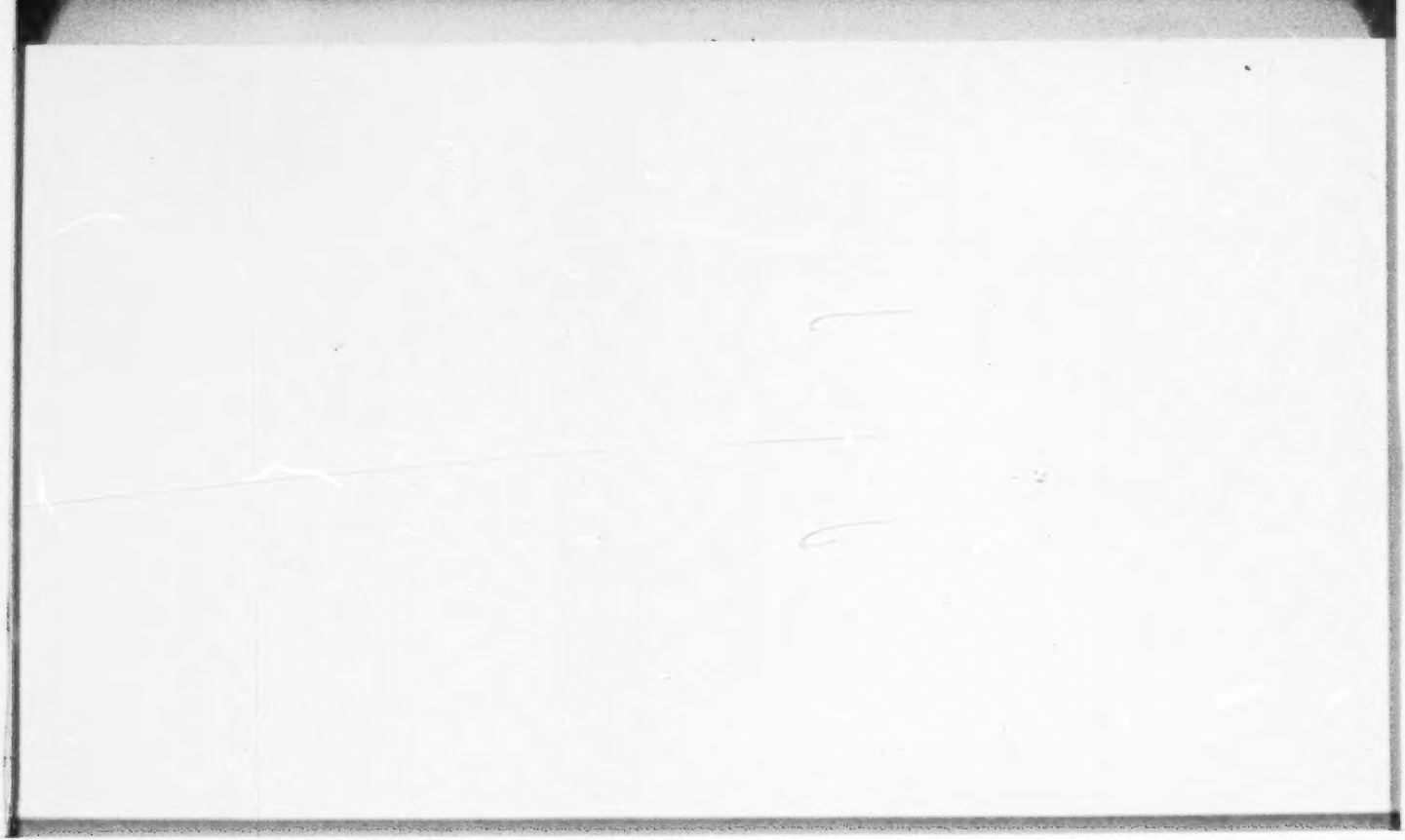
We submit that whether the statute discourages the creation of charitable trusts, abolishes powers of revo-

cation, or places the burden of the taxes on the beneficiaries of such trusts, the result is unjust and unreasonable; and that a statute imposing such a tax without a legitimate object (there being no tax evasion possible in a charitable trust), contrary to the clearly defined policy of the law (which favors the creation and unhampered administration of charitable trusts), and in conflict with other express provisions of the same statute (which exempt the income of such trusts from all taxes), is "so arbitrary and capricious that its enforcement would amount to deprivation of property without due process of law within the inhibition of the 5th Amendment." (*Blodgett v. Holden*, 275 U. S. 142, 147, 72 L. Ed. 206.)

We respectfully submit that the petition for a writ of certiorari to the Circuit Court of Appeals should be granted.

Dated, San Francisco,
September 25, 1929.

MARCEL E. CERF,
B. E. WITKIN,
HENRY ROBINSON,
Amici Curiae



SUPREME COURT OF THE UNITED STATES.

No. 344.—October Term, 1929.

Charles A. Corliss, Petitioner,
vs.
Frank K. Bowers, Collector of Internal Revenue for the Second District of New York.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[April 28, 1930.]

Mr. Justice Holmes delivered the opinion of the Court.

This is a suit to recover the amount of an income tax paid by the plaintiff, the petitioner, under the Revenue Act of 1924, June 2, 1924, c. 234, § 219, (g) (h), 43 Stat. 253, 277. (U. S. C., Tit. 26, § 960.) The complaint was dismissed by the District Court, 30 F. (2d) 135, and the judgment was affirmed by the Circuit Court of Appeals, 34 F. (2d) 656. A writ of certiorari was granted by this Court.

The question raised by the petitioner is whether the above section of the Revenue Act can be applied constitutionally to him upon the following facts. In 1922 he transferred the fund from which arose the income in respect of which the petitioner was taxed, to trustees, in trust to pay the income to his wife for life with remainder over to their children. By the instrument creating the trust the petitioner reserved power "to modify or alter in any manner, or revoke in whole or in part, this indenture and the trusts then existing, and the estates and interests in property hereby created" &c. It is not necessary to quote more words because there can be no doubt that the petitioner fully reserved the power at any moment to abolish or change the trust at his will. The statute referred to provides that "when the grantor of a trust has, at any time during the taxable year, . . . the power to revest in himself title to any part of the corpus of the trust, then the income of such part of the trust for such taxable year shall be included in computing the net income of the grantor." § 219 (g) with other similar provisions as to income in § 219 (h). There

can be no doubt either that the statute purports to tax the plaintiff in this case. But the net income for 1924 was paid over to the petitioner's wife and the petitioner's argument is that however it might have been in different circumstances the income never was his and he cannot be taxed for it. The legal estate was in the trustee and the equitable interest in the wife.

But taxation is not so much concerned with the refinements of title as it is with actual command over the property taxed—the actual benefit for which the tax is paid. If a man directed his bank to pay over income as received to a servant or friend, until further orders, no one would doubt that he could be taxed upon the amounts so paid. It is answered that in that case he would have a title, whereas here he did not. But from the point of view of taxation there would be no difference. The title would merely mean a right to stop the payment before it took place. The same right existed here although it is not called a title but is called a power. The acquisition by the wife of the income became complete only when the plaintiff failed to exercise the power that he reserved. *Saltonstall* v. *Saltonstall*, 276 U. S. 260, 271. *Chase National Bank* v. *United States*, 278 U. S. 327. *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339. Still speaking with reference to taxation, if a man disposes of a fund in such a way that another is allowed to enjoy the income which it is in the power of the first to appropriate it does not matter whether the permission is given by assent or by failure to express dissent. The income that is subject to a man's unfettered command and that he is free to enjoy at his own option may be taxed to him as his income, whether he sees fit to enjoy it or not. We consider the case too clear to need help from the local law of New York or from arguments based on the power of Congress to prevent escape from taxes or surtaxes by devices that easily might be applied to that end.

Judgment affirmed.

The CHIEF Justice took no part in this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.